DOCKET

No. 07-6984

Title:	Carlos Jimenez, Petitioner v. Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division
Docketed:	October 11, 2007
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(06-11240)
Decision Date:	May 25, 2007
Rehearing Denied:	August 21, 2007

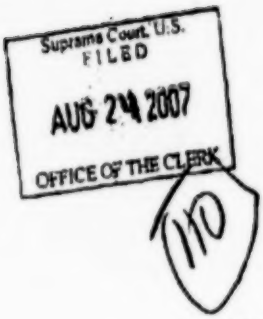
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Aug 24 2007	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 13, 2007)
Nov 29 2007	DISTRIBUTED for Conference of January 4, 2008.
Dec 6 2007	Response Requested . (Due January 7, 2008)
Dec 21 2007	Order extending time to file response to petition to and including February 6, 2008.
Feb 6 2008	Brief of respondent Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
Feb 21 2008	DISTRIBUTED for Conference of March 14, 2008.
Mar 17 2008	Motion to proceed in forma pauperis GRANTED. The petition for a writ of certiorari is GRANTED limited to Question 1 presented by the petition for a writ of certiorari.
Apr 3 2008	Record received from U.S.C.A. for the 5th Circuit and U.S.D.C. for the Northern District of Texas irecord ncluded. (1 box)
Apr 25 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 10, 2008.
Jun 10 2008	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including June 17, 2008.
Jun 10 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner.
Jun 11 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the respondent
Jun 17 2008	Joint appendix filed.
Jun 17 2008	Brief of petitioner Carlos Jimenez filed.
Jun 24 2008	Brief amici curiae of Texas Fair Defense Project, et al. filed.
Jul 8 2008	The time within which to file respondent's brief on the merits is extended to and including August 26, 2008.

Jul 31 2008	CIRCULATED
Aug 13 2008	The time within which to file respondent's brief on the merits is further extended to and including September 5, 2008.
Aug 18 2008	SET FOR ARGUMENT ON Tuesday, November 4, 2008
Sep 5 2008	Brief of respondent Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
Oct 6 2008	Reply of petitioner Carlos Jimenez filed. (Distributed)
Nov 4 2008	Argued. For petitioner: Thomas C. Goldstein, Washington, D.C. For respondent: Sean D. Jordan, Deputy Solicitor General, Austin, Tex.

PETITION FOR WRIT OF CERTIORARI

07 6984



No. 6

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS JIMENEZ — PETITIONER
(Your Name)

vs.

NATHANIEL QUARTERMAN
DIRECTOR, TDCJ-CID — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT, AT SAN ANGELO
UNITED STATES COURT OF APPEALS, FIFTH CIR., DENIED C.O.A.

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CARLOS JIMENEZ
(Your Name)
P.O. BOX 9200
(Address)
NEW BOSTON, TEXAS 75570-9200
(City, State, Zip Code)
TELFORD UNIT
(Phone Number)

QUESTION(S) PRESENTED

QUESTION ONE : "Whether a Certificate of Appealability should have issued pursuant to Slack v McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) on the question of Whether pursuant to 28 U.S.C. § 2244 (d)(1)(A) When through no fault of the petitioner, he was unable to obtain a direct review and the highest State Court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review resetting the 1-year limitations period?"

QUESTION TWO : "Whether a Certificate of Appealability should have issued pursuant to Slack v. McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595. 1604 (2000) on the question of Whether the circumstances of petitioner's cause of action present rare and exceptional circumstances warranting equitable tolling of the 1-year limitations period of 28 U.S.C. § 2244 (d)(1)(2)?"

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Mr. Gregg Abbott
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 25, 2007.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

QUESTION NUMBER ONE : THE CONSTITUTIONAL PROVISION INVOLVED IS THE DENIAL OF THE 5TH AND 14TH AMENDMENTS CONSTITUTIONAL DUE PROCESS OF LAW AND THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT IN RELATIONSHIP TO 28 U.S.C. § 2244 (d)(1)(A).

QUESTION NUMBER TWO : THE CONSTITUTIONAL PROVISION INVOLVED IS THE DENIAL OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION IN RELATION TO EQUITABLE TOLLING OF 28 U.S.C. § 2244 (d)(1)(2).

STATEMENT OF THE CASE

Petitioner is in State custody pursuant to a judgment and sentence of the 119th District Court of Tom Green County, Texas, in Cause Number CR91-0528-B, styled The State of Texas V Carlos Jimenez. Tr 35-39 (Judgment)(Tr refers hereafter to State Clerk's REcord and SF refers hereafter to Statement of Facts (State REporters REcord of guilty plea and revocation hearing proceeded by volume number and page number and Lines if necessary) Petitioner was charged by indictment with burglary of a habitation, enhanced by one felony conviction. Tr at 1(Indictment) Petitioner pleaded guilty to the charge and true to the enhancement paragraph. 2SF 5. On NOvember 12, 1991, pursuant to a plea agreement, Petitboner was placed on deferred adjudication probation for five years. 2 SF 14-15; Tr 15-25.

After serving 3 years and 4 months of his probation the State moved to proceed with adjudication of guilt on March of 1995. Tr 26-28. On November 6, 1995, the trial court held a hearing, adjudicated guilt, and sentenced petitioner to forty-three years confinement. 3 SF 115-18; Tr 35. Petitioner filed a motion for new trial and notice of appeal. Tr 47-49. The Third Court of Appeals dismissed the appeal for want of jurisdiction, Jimenez v State, No. 03-96-00123-CR (Tex. App. - Austin , Delivered Sept. 11, 1996) Appellant counsel abandoned Petitioner with no knowledge of what happened to an appeal if any and petitioner had no opportunity for direct appeal, filing his own brief, Discretioary Review, or Certiorari to this Hon. Court.

Petitioner filed his first State Writ challenging his appellate representation and his denial of his direct appeal on April 11, 2002. Ex parte Jimenez, No. 744,33 (Application No. 53,212-01). The Court of Criminal Appeals granted petitioner relief in the form placing petitioner back to the original position he was in when his guilt was adjudicated and sentence imposed, a new and or out of time appeal. Id. (Tex. Crim. App. opinion delivered September 25, 2002) Petitioner was appointed new appellate counsel who filed timely Notice of Appeal pursuant to Texas Rules of Appellate Procedures 25-26 and filed an Anders Brief in which Petitioner filed his own pro se brief. Subsequently, the Court of Appeals issued an opinion affirming Petitioner's conviction in an unpublished opinion on May 15, 2003. Jimenez v State, No. 03-02-00733-Cr (TEx. App. Austin 2003) ; Ex parte Jimenez, No. 53,212-02, at 87-90 (copy of appellate opinion) Petitioner filed a Petition for Discretionary REviev which was subsequently refused on October 8, 2003. Jimenez v State, PDR No. 937-03. Petitioner did not waive his right to file a Writ of Certiorari with this HOnorable Court or the 90 days to file such a writ, pursuant to Supeme Court Rule 13, but did not feel he had a ground developed to the extent that would warrant Certiorari at that time. Instead Petitioner filed his second State Writ and his first challenging his conviction to bring grounds that he felt he could expand and develope the record in Habeas by hearing etc. on December 6, 2004, Ex parte Jimenez, No. 53,212-02, at 17. The Texas Court of Criminal

Appeals denied the application without written order on the findings of the trial court without a hearing on June 29, 2005. Id. at cover.

Petitioner filed his Federal Petition on July 22, 2005. Respondent filed his Answer with Brief in support on October 2, 2005. The U.S. District Court issued an Order on October 23, 2006 Dismissing Petitioner's case with prejudice pursuant to 28 U.S.C. § 2244 (d)(1). (see Appendix B)

Petitioner filed a timely Notice of Appeal with the U.S. District Court with an Application of informa pauperis which was granted to proceed with a further proceeding in the Fifth Circuit Court of Appeals.

Petitioner submitted an Application Requesting the Fifth Circuit to grant a Certificate of Appealability which was denied May 25, 2007, thus producing the necessity to file this his instant Petition for Writ of Certiorari in this Honorable Highest Court in the Land: (see Appendix A)

REASONS FOR GRANTING THE PETITION

REASON FOR GRANTING PETITION NUMBER ONE:

The United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals, namely the Tenth Circuit in Orange v Calbone, 318 F. 3d 1167, 1170-71 (10th Cir. 2003) and the Fourth Circuit in Frasch v Peguese, 414 F. 3d 518, 522-23 (4th Cir. 2005); and or The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

QUESTION ONE (Restated) : "Whether a Certificate of Appealability should have issued pursuant to Slack v McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) on the question of Whether pursuant to 28 U.S.C. § 2244 (d)(1)A) When through no fault of the petitioner, he was unable to obtain a direct review and the highest State Court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review resetting the 1-year limitations period?"

A Certificate of Appealability (COA)will issue only if the requirements of 28 U.S.C. § 2253 have been satisfied.The COA Statute 28 U.S.C. § 2253 (c)(1) establishes procedural rules and requires a threshhold inquiry into whether the circuit court may entertain an appeal. Slack v McDaniel 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) The Statute permits the issuance of a COA only where petitioner has made a substantial showing of the denial of a Constitutional right. Slack, supra, at 483, 120 S.Ct. 1595. This Court has stated in Slack, "[W]here a district court has rejected the constitutional claims on merits, the showing required to satisfy § 2253 (c) is straight forward: The petitioner must demonstrate that reasonable jurists would

find the district court's assessment of the constitutional claims debatable or wrong." , 529 U.S., at 484, 120 S.Ct. 1595. ; Miller El, 123 S.Ct. 1029, 1039-40 (2003.

"The issue becaomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds without reaching the prisoner's underlying constitutional claims, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the district court was correct in it's procedural ruling. " Slack v McDaniel, 120 S.Ct. 1595, Id. at 1604.

In Miller El, 123 S.Ct. 1029, 1039-40 (2003) this HOnorable Court cautioned that "We do not require a petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed a claim can be debatable even though every jurist of reason might might agree, after COA has been granted and the case has received full consideration, that petitioner will not prevail." Id. at 1040.

In the instant case and the immediate question at issue, the district court's decision and the Fifth Circuits controlling law of their circuit , namely Salinas v Dretke, 354 F. 3d 425 (5th Cir. 2004) cert denied, 541 U.S. 1032 (2004) should be at least debatable by reasonable jurists in that the sister circuits are sharply divided on this issue. see Orange v Calbone, 318 F. 3d 1167, 1170-71 (10th Cir. 2003)Fr Frasch v Peguese, 414 F. 3d 518, 522-23 (4th Cir. 2005)

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (the Act), Pub. L. 104-132, Stat. 1217. Title I of the Act applies to all federal petitions for habeas corpus filed on or after it's effective date, which is the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 326 (1997).

Title I of the Act substantially changed the way federal courts handle habeas corpus actions. One of the major changes is a one-year statute of limitations. see 28 U.S.C. § 2244(d)(1)(A) (in relevant part)which provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitaion period shall run from the latest of --
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the exiration of the time for seeking such review;

There is no dispute that petitioner filed his federal petition after the effective date of act April 24, 1996 as petitioner filed his petition on July 19, 2005. (see Appendix B at 3)

This Court has consistently held that "A conviction becomes final once the defendant exausts all direct appeals and once either the time for filing a petition for certiorari on direct appeal elapses or the Supreme Court denies a petition for certiorari on direct review." Teague v Lane, 489 U.S. 288, 315 (1989)

Due to no fault of petitioner he was denied his first direct appeal including Petition for Discretionary REview, and petition for Certiorari or the time to file Certiorari. see Texas Rules

of Appellate procedure 68 and Rules of the Supreme Court Rule 13. Subsequently petitioner filed a State habeas corpus on April 11, 2002, complaining that he had been denied his right to direct appeal because his attorney had abandoned him without any notice or any further contact. see Ex parte Jimenez, App. No. 53,212-01). The Court of Criminal Appeals granted petitioner relief on September 25, 2002 (No. 74,433) in an unpublished Opinion stating Etal, "Relief is granted. Applicant is entitled to an out-of-time appeal in cause number CR-91-0528-B in the 119th Judicial District Court of Tom Green County. Applicant is ordered returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure , all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. We hold that should Applicant desire to prosecute an appeal, he must take affirmative steps to see that written notice of appeal is given within thirty days after the mandate issued) (Opinion Del. September 25, 2002 unpublished); Tr. 57-59(Mandate Issued)

The Fifth Circuit has held "The right to an out of time Petition for Discretionary REview does not require the federal court to restart the running of the 1-year limitations period) Eeremansv Dretke 383 F. 3d 336 (5th Cir. 2004); Salinas v Dretke 354 F. 3d 425,430 (5th Cir. 2004) Petitioner's case is distinctive in that he was not only was denied his first appeal to the intermediate court, but to petition the highest State Courtlike Salinas, and lose his right to Certiorari or the time to file Certiorari to this HOnorable Court. Petitioner did not voluntarily

waive his right to file his Certiorari or the time to file his petition for writ of certiorari. see Roberts v Cockrell, 319 F. 3d 690, 693 (5th Cir. 2002) The Fifth Circuit assuming that because Roberts was unable to pursue direct appeal he waived his right to seek certiorari from this Court) see Id. 693 note. 14.

The sharp contrast between the Fifth Circuit and her sister courts should be enogh to make reasonable jursts agree that this issue is arguable and in distint conflict. Petitioner would request this Court to consider the sound reasoning in Frasch v Peguese, 414 F. 3d 518-20 (6th Cir. 2005); Orange v Calbone, 318 F. 3d 1167, 1170-71 (10th Cir. 2003) (holding that "if a criminal defendant proves he was denied a part of his statutory direct appeal through no fault of his own, to the highest court of last resort and relief is granted, for the purposes of 28 U.S.C. § 2244 (d)(1))A) his one-year limitations period should begin at the conclusion of his direct review or the time for seeking his nest review") see Also Miller v Collins 305 F. 3d 491, 494 (6th Cir. 2002)(revisiting their finding in Bronough v State of Ohio, 235 F. 3d 280, 286 (6th Cir. 2000 in opposition, but because case could be disposed of without overuling Bronough, declined to rule on issue)

Petitioner believe's that the Federal courts should defer to thethe highest State court's ruling when the court allows the direct appeal to restart and give a defend ant a meaningful first direct appeal fully including writ of certiorari or time to file CErtiorari. More recently the circuit split has grown

pronounced as in Summers v. Schriro 486 F. 3d 710 (9th Cir. 2007) the Ninth Circuit in deciding that a "Prisoner's of Right proceeding was a form of Direct REview within the meaning of the habeas limitations Statute." and verified that as of late the Fourth, Tenth and Eleventh Circuits have held that classification of State Direct Review is a question of State Law pursuant to 28 U.S.C. § 2244 (d)(1)(A) and the Fith, Sixth and now Ninth Circuits have held that although the final State REview is heavily informed by State Law Classification is ultimately a Question of Federal Law. Compare, Frasch v Peguese 414 F. 3d 518, 522 (4th Cir. 2005); Orange v Calbone 318 F. 3d 1267, 1270, (10th Cir. 2003); Bridges v Johnson, 284 F. 3d 1201, 1202 (11th Cir 2003) in direct contrast to, Foreman v Dretke, 383 F. 3d 336, 339 (5th Cir. 2004); Lopez v Wilson, 426 F. 3d 339, 351 (6th Cir 2005, En Banc); White v Klitzke, 281 F. 3d 920, 923 (9th Cir. 2003)

The Fifth, Sixth, and Ninth Circuits do not aknowledge the unfairness of a defendant through no fault of his own not only losing his direct appeal, in the form of intermediate court of appeals, and Petition for Discretionary REviews to the highest State Court, but the presumtion of waiver of the right to file Petition for Writ of Certiorari to this Court, see Roberts v Cockrell, 319 F. 3d at 693. note 14., supra. In the instant case there is no other remedy to correct an unjust and unfair, and ineqitable premature completion of State Direct REview that was time barred before he ever found out about it, except on a post conviction State habeas corpus that allows the Court jurisdiction to remedy such rare cases. see Ex parter Wilson, 956 S.W. 2d 25, 27-29 (Tex. Cr. App. 1998)

In the Federal Court process when a defendant is allowed an out of time appeal for ineffective assstance of counsel it triggers the running of a new 10 day appeal period. U.S. v West, 240 F. 3d 456 (5th Cir. 2001)

Allowing the State to regulate the completion and restarting of the direct appeal to a menaingful final conviction and then allowing the 90 days to file Certiorari would not hinder the purpose of the AEDPA "to further the principals of comity, finality and federalism. These instances are rare and very hard to prove to the Texas Courts as this Court can take judicial notice. see Duncan v Walker, 121 S.Ct. 2120, 2190 (2001); Ex parte Wilson 956 S.W. 2d 25, 27 (1998)(noting that Petitioner Wilson while controlling post conviction ineffective assistance of counsel on appeal in Texas Courts, Wilson himself did not get relief because he could not meet the almost impossible standard of proof) Out of time Petitions for Discretionary Review and out of time first direct appeals are very rare in Texas and would not jeopardize either the promotion of consistancey and predictability in the application of AEDPA, even as it stays true to Congress purpose, nor upset theprincipals of comity, finality and federalism. However it would avoid a fundamental miscarriage of justice and denial of Due process and Equal protection in affording a defendant his 1st direct appeal of right, Certiorari to this Court or the time to file CErtiorari and an adequate time to file State and Federal habeas challenging his conviction. In Lonchar v Thomas 116 S.Ct. 1293, 1299 (1996) this Honorable Court cautioned the lower courts, "Dismissal of a first federal petition is a particularly serious matter, for that dismissal denies the

petitioner the protection of the "Great Writ" entirely, risking injury to an important interest in human liberty."

Petitioner has conceded that his Claims Regarding his Plea of guilt and placement on defered adjudication are meritless even if not time barred. (see Appendix B at 6) and Caldwell v Dretke, 429 F. 3d 521 (5th Cir. 2005); cert. Denied, Caldwell v Quarterman, 127 S.Ct. 432-32 (2006) (holding that defered adjudication is a final conviction when challenging guilt after first entering plea for purposes of 1-year limitations period.)

However, the instant issue pertains to the underlying Claims involving the revocation or deferred adjudication Community Supervision. (see Appendix B at 11) If this Court agrees with the reasoning of Salinas v Dretke, 354 F. 3d 425 (5th Cir. 2004), cert. denied, 541 U.S. 1032 (2004) and the concurring sister circuits, Petitioner was time barred on or before October 11, 1997, before he ever knew he had been abandoned on appeal, his appeal was dismissed, and that he was time barred. (Appendix B at 11) If this Honorable Court rejects Salinas, supra, and adopts Frasch v Peguese, 414 F. 3d 518 (4th Cir. 2005) and the concurring sister Circuits Petitioner would be as a matter of Due Process and Equal Protection, on time and have at least Nine viable Claims under revocation or deferred adjudication Community Supervision proceedings. (see Appendix B at 11)(counting subpoints)

Petitioner has demonstrated that "reasonable jurists would find the district courts assessment of Petitioner's constitutional claims debatable or wrong and a COA should issue because Petitioner has shown at least, that jurists of reason would find it debatable whether Petitioner states a valid claim or the district court was correct in it's procedural ruling. Slack v McDaniel, 120 S.Ct. 1595, 1604 (2000); Miller El v Cockrell, 123 S.Ct. 1029, 1040 (2003) This Court should issue Certiorari on the Question at issue.

REASON FOR GRANTING PETITION NUMBER TWO:

> The United States Court of Appeals has entered a decision on an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court, in the following question:

QUESTION TWO (REstated) : "Whether a Certificate of Appealability should have issued pursuant to Slack v McDaniel, 529 U.S. 473, 482, 120 S.Ct. 1595, 1604 (2000) on the question of Whether the circumstances of petitioner's cause of action present rare and eceptional circumstances warranting equitable tolling of the 1-year limitations period of 28 U.S.C. § 2244 (d)(1)(2)?"

To obtain a COA under 28 U.S.C. § 2253 (c), a habeas prisoner must make a substabtial showing of a constitutional right, a demonstration that shows jurists of reason could debate whether the issues presented were "adequate to deseve encouragement to proceed further or should have been resolved in a different manner." (emphasis added) Slack v McDanies, 120 S.Xt. 1595, 1604 (2000)

"The issue becaomes somewhat more complicated where, as here , the district court dismisses the petition based on

procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's undrlying constitutional claims, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the district court was correct in it's procedural ruling." Slack v McDaniel 120 S.Ct. 1595,Id. at 1604.

In Miller El, 123 S.Ct. 1029, 1040 (2003) this Honorable Courtcautioned that "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed a claim can be debatable even though every jurist of reason might agree, after the COA had been granted and the case has received full consideration, that petitioner will not prevail. " Id. at 1040.

Petitioner requests that if this Honorable Court does find that he is Statutorily barred by the Statute of Limitations, that he be given equitable tolling under the "rare and exceptional circumstances" of his case.

Because the 1-year "AEDPA" statute of limitations is not a jurisdictional bar, the statute of limitations can be equitably tolled, in rare and exceptional circumstances. Davis v Johnson, 158 F. 3d 806, 811 (5th Cir. 1998), Cert. Denied, 526 U.S. 1074. (1998)

Equitable tolling of the statute of limitations was raised in Duncan v Walker, 121 S.Ct. 2120, 2129 (2001) as Justice Stevens refered to it briefly, but because the issue was not raised properly it was not addressed.

Petitioner was initially deprived of his first appeal of right as an indigent by his appointed attorney Duke Hooten. see Evitts v Lucy 469 U.S. 387, 396 (1985)(Sixth Amendment right requires effective assistance of counsel during first appeal of right) Mr. Hooten was not only ineffective on appeal, ut through affirmative miscondut continued to deceive and mislead the appellate court and petitioner with his blatant lies. (see Ex parte Jimenez No. 53,212-01 Exhibit 4 pg 2 of Appellate Brief Certificate of Counsel and letter attached dated July, 12, 1996 pgs 28-41 habeas record, Petitioner's time sheet stating Petitioner was received into TDCJ-ID 4-4-96 a little over three months from when Mr. Hooten said he hand delivered the brief and letter of instructions at Tom Geen County jail to Petitioner) see Irvin v Dept of Veterens Affairs 498 U.S. 89, 96, 111 S.Ct. 453, 458 112 Led. 2d 435 (1990) (stating that court allowed equitable tolling in situations where complainent has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass); see also Arce v Garcia 400 F. 3d 1340, 1349 (11 Cir. 2005)(holding that the need for some kind of affirmative misconduct for equitable tolling) There is no question that on the record before this Court and the facts of this case Mr. Hooten misled and tricked the appellate court, the District Clerk, and Petitioner by filing an Anders brief that was ultimately dismissed by the appellate Court and instead of contancting Petitioner in a timely manner and explaining what happened so he could take appropriate action he left Petitioner to wonder what happened until he was forced to submit an affidavit and then claimed amnesia about all of his cases.

(see Ex parte Jimenez, No. 53,212-01 attachment 15 affidavit by Duke Hooten, record on habeas 81-82) dated May 21, 2002) Petitioner wrote a letter to Mr. Hooten, and the Appellate Court. Mr. Hooten never contacted Petitioner after the Appeal was dismissed or answered any of his letterw of inquiry. The Court of Appeals just stated no record of appeal. The District Clerk finally provided a portion of the record and verified that something had been sent to Tom Green Jail after Petitioner had left to go to TDCJ-Id 4-4-96. (see Exhibits 1,2, and 3 in habeas record pages 25-25)

Petitioner pursued diligently every avenue he had available to find out about his appeal before the 1-year limitations ran out in October of 1997, but to no avail, he was time barred before he ever became aware of any information relating to his appeal in 1998. After 9-4-97 Petitioner wrote additional letters and tried to get other inmates to help him because being HIspanic and his first language being Spanish, along with having no or very little former education he was not able to help himself or understand the most basic of legal or factual principals in law. Around the first part of 1998 Petitioner finally received a copy of the brief and the letter etc. (see Exhibit #4 pages of habeas record 28 -41) Not knowing Petitioner was already time barred he still pusued vigorously his appeal and post conviction remedies. Because Petitioner can only be housed in a Transfer Facility for Two years Petitioner was transfered to a regular ID Unit, Telford Unit, sometime prior to April 1998.

Petitioner went to the law library after he arrived on the Telford Unit and tried to seek help from knowledgable inmates.

In 1998 the AEDPA Statute of Limitations, 28 U.S.C., 2244 (d)(1)(2) case law was not fully developed and on the Prison Law Libraries. example Davis v Johnson, 158F. 3d 806, 811 (5th Cir. 1998),Cert denied, 526 U.S. 1074 (1999) (holding limitations is not a jurisdictional bar and equitible tolling availabe in the Fifth Circuit)

Petitioner tried diligently to get someone to help him, but the Supervisor and officers in the law library did not knov the law themselves nor would they or State Counsel for Offenders file State or Federal Writs for you, even if they could. Petitioner being indigent and incarcerated for ove 13 years at that time could not pay inmates to help him and finally after a long period of trying and hearing you are already time barred and we can not help you for free, an inmate, who was Hispanic and very knowledgable about the law agreed to help me with my case. The called him Wheto, because he was light skinned. He explained to me that Texas Law was unsettled on whether you could file a first state writ not challenging your conviction and then file a second writ to challenge your conviction without it being a successive writ under Texas Code of Criminal Procedure 11.07 Section 4. For instance the Texas Court of Criminal Appeals on December 18th of 1997 in Ex parte Rawlinson 958 S.W. 2d 198, 200-01 (TEx. Cr. App 1997) (held that prisoner Rawlinson's challenge to ineffective assistance of counsel on appeal was barred by the successive writ doctrine) Just four months later the same TExas Court of Criminal Appeals held in Ex parte Evans, 964 S.W. 2d 643, 647 (TEx Cr. App 1998) ((a claim that does not address the validity of the underlying

conviction under Art. 11.07 Sect. 1 and is not a challeng to the conviction under 11.07 Section 4 because it does not call into question the validity of the prosecution or the judgment of guilt) Evans having been decided in September of 1998 was followed by Ex parte Whiteside, 12 S.W. 3d 819, 823 (TEx Cr. App. 2000) in March of 2000 and finally Ex parte Rieck , 44 S.W. 3d 510 (Tex. Cr. App 2004)

Petitioner was convinced that he could challeng his denial of direct appeal by ineffective assistance of appellate counsel on appeal and still have a challenge of his conviction cognizant on a second petition. Petitioner although, believed that he could not go to Federal Court because he was time barred. Salinas v Dretke was not decided as of yet, 354 F. 3d 425 (5th Cir. 2004) Even if Petitioner obtained a new direct appeal he was not sure he could ever go to federal court, so he was being very sure that he got his full bite of the apple in State Court, which he did. (see Ex parte, Jimenez, No 53,212-01 and Ex parte Jimenez, No 53,212-02) Petitioner is still unsure if a new appeal or Petition for Discretionary REview resets the 1-year limitations period, as this Court has not visited this Question to Petitioner's knowledge. Keeping in mind Petitioner is not priviledged to the Rulings for 2 to 4 month after they come out on the unit and the Shephardization Process is faulty at times in prison unit library's.

About the time Wheto was going to help Petitioner file his first State Petition, he was transfered off the Unit. Petitioner had to go through the whole process of getting someone else to assist him in continuing in the process. Petitioner finally filed

his first state habeas on April 11, 2002, (see Exparte Jimenez, No. 53,212-01) and obtained a Christian helper that is committed to Petitioner presenting his case to this Honorable HIghest Court in the Land, if he is not transfered before the deadline to file this Petition. (TDCJ- Rules of Correspondance chaned inMay of 2003 and inmates can no longer write each other even to help with their legal cases, unless they are a co-defendant in the case) The Texas Court of Criminal Appeals in an opinion delivered on SEptember 25, 2002, granted permission to file an out of time appeal (APP. No 53,212-01)

On October Petitioner filed a notice of appeal on the 25th day, 2002. In an unpublished Memorandum Opinion filed May 15, 2003 the Third Court of Appeals affirmed Petitioner's conviction and sentence (No. 03-02-00733-CR) considering not only the new appointed Counsel's Anders Brief, but Petitioner's pro se brief on merits. Petitioner filed a pro se Petition for Discretionary REview, which the Texas Court of Criminal Appeals refused on October 8, 2003.

Petitioner filed a second state application for writ of habeas, as a first challenge to his conviction on habeas on December 5, 2004. The TExas Court of Criminal Appeals denied the application without wwritten order on the findings of the trial court without a hearing, on the merits on June 29, 2005 (App No. 53-212-02)

The instant federal Petition was filed on July 19, 2005, persuant to Houston v Lack, 108 S.Ct. 237) (1988); see also Spotville v Cain, 149 F. 3d 374, 378 (5th Cir.1998)(holding

that for the purposes of determining the applicability of the AEDPA, a federal petition is considered filed on the date it is delivered to prison officials for mailing to the district court.) Petitioner from April 11, 2002, to this present date August 21, 2007, has not missed one State or Federal filing or one procedure as untimely or frivilous in over 5 years of litigation and will place this instant petition in the indigent law library mailbox for filing tommorrow August 22, 2007 as the deadline for filing is August 25, 2007. (see Appendix A 5th Cir. Decision on May 225, 2007, Rule of Supreme Court 13 90 days to file writ of Certiorari)

Although there may be several defendants that deserve equitable tolling on similar circumstances as Petitioner throughout the United States of America, this Honorable Court can take Judicial Notice that Petitioner's set of facts are rare and exceptional in Texas, where it is rare that a Petitioner would have the proof that a licenced, trained, skilled, attorney would lie about taking a copy of a Anders Brief to an indigent, incarcerated inmate and then abandon him completely and then get amnesia about the case and only through fate actually get caught. (see Jimenez Ex parte, 53,212-01 the entire record on state habeas and Exhibits.) It is interesting to note that Ex parte Wilson, 956 S.W. 2d 25, 27 (Tex. Cr. App. 1998) the controlling case of ineffective assistance of Counsel on Direct Appeal, did not get relief because it came down to Petitioner Wilson's word against his Attorney and because of the credibility of the attorney he was forever denied a first appeal of right, which obviously effected his whole State and Federal post conviction process.

One such rare and exceptional circumstance was recognized in Alexander v Cockrell, 294 F. 3d 626 (5th Cir. 2002) in which the Fifth Circuit Court held that the district court did not abuse it's discretion when it applied equitable tolling based on United States v Patterson, 211 F. 3d at 931, because the court had merely used language that could have mislead the Petitioner into believeing that he could file a subsequent Section 2255 petition. 294 F. 3d at 629.

Petitioner has alleged acts and omissions of his appellate counsel, his inability to obtain the whole transcript or retrieve his file from appellate counsel in time to correct his direct appeal prior to October 1997, and Petitioner's numerous good faith efforts to have his case reviewed at the state level, seeing he is HIspanic, uneducated, and relying almost completely on other inmates, prior to filing this instant application, under Section 2254, theese circumstances should act to toll the limitations period, even though Petitioner believe's he may be Statutorily timely under 28 U.S.C. § 2244 (d)(1)(A), which should have reset his 1-year limitations at the conclusion of his out of time appeal. see Orange v Calbone 318 F. 3d 1167, 1170-71 (10th Cir. 2003) Frash v Peguese, 414 F. 3d 518, 522-23 (4th Cir. 2005) However in the alternative, Petitioner concedes that if Statutorily barred he should get equitable relief.

Since the AEDPA one-year limitations is not a bar to federal jurisdiction it can be equitably tolled, albeit only in "rare and exceptional circumstances." Felder v Johnson, 204 F. 3d 168, 171 (5th Cir. 2000) (citations ommitted)

In Fisher v Johnson, 174 F.3d 710, 713 (5th Cir. 1999) the Fifth Circuit held that courts must examine each case on its facts to determine whether it presents sufficiently rare and exceptional circumstances to justify equitable tolling." (citations ommitted). "Equitable tolling is a discretionary doctrine that turns on the facts and circumstances of (each) particular case and does not lend itself to bright line rules.:Id. at 713. The doctrine of equitable tolling preserves a plaintiff's claims when the strict application of the statute of limitations would be inequitable. United States v Patterson, 211 F. 3d 927, 930 (5th Cir. 2000); see also Davis v Johnson, 158 F. 3d 806, 810 (5th Cir. 1998)

In order for equitable tolling to be applicable, it is necessary that the petitioner have been prevented, through no fault of his own, from asserting his claim. see Coleman v Johnson, 184 F. 3d 398, 403 (5th Cir. 1999); Cousin v Lensing, 310 F. 3d 843, 848 (5th Cir. 2002)

Appellate Counsel's inexplicable neglect of Petitioner's rights as well as counsel's own ethical obligations to Petitioner, presents a "rare and extra ordinary circumstance" beyond Petitioner's control that warrants equitable tolling of the statute of limitations. This Honorable Court of last chance should find that the case before it presents "rare and exceptional circumstances" and should grant Certiorari to grant COA and either look at the merits in the case or remand to the Fifth Circuit on the merits. In light of actions and inactions of appellate counsel and Petitioner's genuine attempts to littigate his issues to finality, it would be inequitable to bar Petitioner from presenting his application.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Carlos Jimenez

Date: August 21, 2007

Pursuant to Supreme Court Rule 29 in the foregoing petition for Writ of Certiorari proceeding, the Writ and all accompanying documents have been deposited in the Telford Unit indigent Mailbox in the Law Library on or before August 22, 2007 and is timely filed with this Court. "I declare under penalty of perjury under the laws applicable that the foregoing is true and correct."" Executed this 21st day of August, 2007.

Carlos Jimenez

Carlos Jimenez #745196

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

CARLOS JIMENEZ _____ — PETITIONER
(Your Name)

VS.

NATHANIEL QUARTERMAN — RESPONDENT(S)
DIR. TDCJ-CID.

PROOF OF SERVICE

I, CARLOS JIMENEZ, do swear or declare that on this date, August 22, 20 07, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Mr. Gregg Abbott, Office of the Attorney GEneral of TExas

P.O. Box 12548, Capitol Station

Austin, Texas 78711-2548

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 21, 20 07

Carlos Jimenez
(Signature)

APPENDIX A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

May 25, 2007

Ms Karen S Mitchell, Clerk
Northern District of Texas, San Angelo
United States District Court
33 E Twohig
Room 202, Federal Building
San Angelo, TX 76903

No. 06-11240 Jimenez v. Quarterman
USDC No. 6:05-CV-52

Enclosed is a certified copy of the judgment issued as the mandate.

Record/original papers/exhibits are returned:

( ) Volumes ( ) Envelopes (1) Box (SCP)

The electronic copy of the record has been recycled.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

Gina Randazzo Martin

By: _____
Gina Randazzo Martin, Deputy Clerk
504-310-7687

cc: w/encl:
Mr Carlos Jimenez
Ms Gretchen Berumen Merenda

MDT-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-11240
USDC No. 6:05-CV-52

United States Court of Appeals
Fifth Circuit
FILED
May 25, 2007
Charles R. Fulbruge III
Clerk

CARLOS JIMENEZ,

Petitioner-Appellant,

versus

NATHANIEL QUARTERMAN,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Carlos Jimenez, a Texas prisoner, pleaded guilty of felony burglary of a habitation and admitted an enhancement charge based on a prior felony conviction. The initial judgment of deferred adjudication was revoked, Jimenez was adjudicated guilty, and he was sentenced to 43 years in prison. The district court dismissed Jimenez's 28 U.S.C. § 2254 petition with prejudice as barred by the one-year statute of limitations. Jimenez now seeks a certificate

of appealability ("COA"), arguing (1) that the granting of an out-of-time appeal by the Texas Court of Criminal Appeals started the limitations period running anew and (2) that he is entitled to equitable tolling.

Jimenez has failed to demonstrate that reasonable jurists would debate the correctness of the district court's conclusion that the § 2254 petition is time-barred. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, the request for a COA is DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CARLOS JIMENEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	6:05-CV-052-C
NATHANIEL QUARTERMAN,[1] Director,	)	
Texas Department of Criminal Justice,	)	
Correctional Institutions Division,	)	
	)	ECF
Respondent.	)	

ORDER

Petitioner Carlos Jimenez, acting *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on July 22, 2005. Respondent filed an Answer with Brief in Support on October 3, 2005, and provided copies of Petitioner's relevant state court records. Petitioner subsequently filed his objections and response on December 5, 2005.

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 119th Judicial District Court of Tom Green County, Texas, in cause number CR91-0528-B, styled *The State of Texas v. Carlos Jimenez*. In that cause number, Petitioner was charged with the felony offense of burglary of a habitation, and one prior felony conviction for aggravated assault with a deadly weapon was alleged to enhance the sentence. Pursuant to a plea agreement, Petitioner pleaded guilty to the charge and true to the enhancement paragraph; and on November 12, 1991, the trial court deferred adjudication and placed him on probation for five years. On December 3, 1991, the trial court entered an Amended Judgment to add the monthly probation fee that had been announced in open court at the sentencing. Petitioner did not appeal.

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[1] Nathaniel Quarterman has been named Director of the Texas Department of Criminal Justice, Correctional Institutions Division, and the caption is being changed pursuant to Fed. R. Civ. P. 25(d).

On March 3, 1995, the prosecution filed a Motion to Revoke Deferred Adjudication, Probation, and to Proceed to Adjudicate Guilt, which alleged that he had violated three terms and conditions of his deferred adjudication probation. A State's First Amended Motion to Revoke Deferred Adjudication, Probation, and to Proceed to Adjudicate Guilt, which alleged four violations of the terms and conditions of probation, was filed on October 3, 1995. Following a hearing on the motion to revoke on November 6, 1995, the trial court found that Petitioner had violated all four terms and conditions of his probation as alleged in the First Amended Motion to Revoke, adjudicated guilt, and sentenced him to forty-three (43) years' incarceration in the Texas Department of Criminal Justice. A Motion for New Trial was filed on December 4, 1995, and the trial court appointed counsel to represent Petitioner or appeal on December 8, 1995. The appointed counsel filed a Notice of Appeal on January 24, 1996. On July 15, 1996, appellate counsel filed an *Anders*[2] brief in the Third Court of Appeals and alleged that, in his professional opinion and after a diligent review of the record, Petitioner had no grounds for an appeal. In a *per curiam* unpublished opinion filed on September 11, 1996, the Third Court of Appeals held that Petitioner's appellate brief was frivolous because the notice did not raise the question of jurisdiction and dismissed the appeal (No. 03-96-00123-CR). Petitioner did not file a petition for discretionary review.

On April 11, 2002, Petitioner filed a state habeas application and argued that he had been denied the right to file an appeal because his attorney had not properly notified him that he was filing

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[2]In *Anders v. California*, 386 U.S. 738 (1967), the Supreme Court of the United States determined that "when [appellate] counsel finds a case to be wholly frivolous, after conscientious examination of it, he should so advise the court and request permission to withdraw." *Id.* at 744. The Court further noted that such request must be accompanied by a brief that refers to anything that might arguably support an appeal and a copy of the brief should be provided to the indigent defendant "and time allowed him to raise any points that he chooses . . . ." *Id.* Thus, an "*Anders* brief" refers to the request to withdraw and accompanying brief that sets out anything that might arguably support an appeal.

an *Anders* brief. In an opinion delivered on September 25, 2002, the Texas Court of Criminal Appeals granted Petitioner permission to file an out-of-time appeal (App. No. 53, 212-01).

On October 25, 2002, Petitioner filed a notice of appeal pursuant to the order granting him permission to file an out-of-time appeal.[3] In an unpublished Memorandum Opinion filed May 15, 1993, the Third Court of Appeals affirmed Petitioner's conviction and sentence (No. 03-02-00733-CR). Although Petitioner filed a *pro se* petition for discretionary review, the Texas Court of Criminal Appeals refused the petition on October 8, 2003.

Petitioner filed a second state application for writ of habeas corpus on December 6, 2004. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on June 29, 2005 (App. No. 53-212-02).

Because Petitioner declared under penalty of perjury that he delivered the instant petition to prison officials for mailing to the court on July 19, 2005, the petition is deemed to be filed as of July 19, 2005. *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (holding that for purposes of determining the applicability of the AEDPA, a federal petition is considered filed on the date it is delivered to prison officials for mailing to the district court).

The Court understands Petitioner to raise the following grounds for review in the instant petition:

(1) He was denied due process at the hearing on the motion to adjudicate and revoke his probation because the judge was biased and had pre-determined his sentence.

(2) He was denied due process because the sentencing judge threatened him with perjury, called him a liar, interrupted Petitioner, denied Petitioner the right to explain why he did not

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[3]Petitioner's appointed attorney also filed an *Anders* brief in the out-of-time appeal and alleged that he could find no grounds for an appeal and any appeal was frivolous and meritless.

understand his previous plea of guilty, and refused to consider the fifteen-year sentencing agreement between Petitioner and the prosecutor.

(3) His conviction was unlawfully obtained because his plea of guilty was coerced, involuntary, and unintelligent.

(4) He was denied effective assistance of counsel at the plea proceeding because counsel failed to adequately explain deferred adjudication or the use of a prior conviction as a sentencing enhancement.

(5) He was denied effective assistance of counsel at the revocation proceeding because counsel did not advise the court that Petitioner had agreed to a fifteen-year sentence, counsel failed to object to the sentencing judge's bias, prejudice, and vindictiveness, counsel was intimidated by the sentencing judge, and he failed to explain to Petitioner that he had to plead true to all allegations in the motion to adjudicate to be eligible to receive a fifteen-year sentence.

Respondent argues that Petitioner has failed to timely file his § 2254 petition.

STATUTE OF LIMITATIONS

Petitioner filed his federal petition after April 24, 1996; therefore, his petition is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA, signed into law on April 24, 1996, enacted the present 28 U.S.C. § 2244(d), which establishes a one-year limitation on filing federal habeas corpus petitions. Sub-section (d) now provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of --
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United

States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Under the statute, the habeas clock begins to run when one of the circumstances included in § 2244(d)(1)(A)-(D) triggers the Act's application.

Petitioner first argues that his petition is not time-barred because the statute of limitations did not begin to run in his case under 28 U.S.C. § 2244(d)(1)(A) until January 8, 2004, because the out-of-time appeal "reset" the one-year period; the conclusion of his "direct appeal" included the periods for filing a petition for discretionary review and a petition for writ of certiorari; and his state habeas applications tolled the limitations period. He does not argue that the one-year limitations period was triggered by the circumstances listed in Sections 2244(d)(1)(B), (C), or (D). Respondent agrees that the applicable section is § 2244(d)(1)(A) but disagrees with Petitioner's tolling arguments and contends that the instant petition is time-barred.

Petitioner raises claims relating both to (1) his initial plea of guilty and deferred adjudication community supervision sentence and (2) the revocation of his deferred adjudication community supervision. Even though Petitioner does not distinguish between the two groups of claims in his limitations argument, this Court will analyze each group separately because each group of claims

became "final" for purposes of the AEDPA's limitations period on different dates. *See Bones v. Dretke*, No. 3:05-CV-2237-M, 2006 WL 1294077, at *2 (N.D. Tex. May 11, 2006) (separating claims challenging an order deferring adjudication and imposing community supervision from a claim challenging an order revoking community supervision and imposing a prison sentence for purposes of calculating the one-year limitations period).

1. Claims Regarding Petitioner's Plea of Guilty and Placement on Deferred Adjudication Community Supervision

On November 12, 1991, Petitioner pleaded guilty and the trial court deferred adjudication and entered an order for five years of community supervision. The trial court entered an Amended Judgment on December 3, 1991. Petitioner did not file an appeal.

Under Section 2244(d)(1)(A), the AEDPA's one-year limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003). The one-year period begins to run under § 2244(d)(1)(A) when the judgment of conviction becomes final, "not when the petitioner becomes aware that the judgment is final." *Crutcher v. Cockrell*, 301 F.3d 656, 657 (5th Cir. 2002). Furthermore, the "AEDPA, not state law, determines when a judgment is final for federal habeas purposes." *Foreman v. Dretke*, 383 F.3d 336, 339 (5th Cir. 2004) (citing *Roberts v. Cockrell*, 319 F.3d at 694).

"Although an order of deferred adjudication is not a judgment under Texas law, it is a judgment under the relevant federal law." *Caldwell v. Dretke*, 429 F.3d 521, 527 (5th Cir. 2005), *cert. denied, Caldwell v. Quarterman*, (No. 05-10671) 549 U.S. ____ (October 10, 2006). "Because an order of deferred adjudication community supervision is a final judgment within the plain meaning of AEDPA section 2254, the one-year statute of limitations, for challenging substantive issues of the

orders of deferred adjudication, beg[ins] to run when the order deferring adjudication bec[omes] final." *Id.* Petitioner did not file an appeal following his plea of guilty; therefore, his conviction became final by expiration of the time for filing a direct appeal from the order deferring adjudication on December 12, 1991. Tex. R. App. P. 41(b)(1) (1990), now Tex. R. App. P. 26.2(a)(1) (stating that a defendant convicted in Texas must file his notice of appeal within 30 days after the trial court imposes or suspends the sentence in open court). *See Scott v. Johnson,* 227 F.3d 260, 262 (5th Cir. 2000) (holding that when a Texas petitioner does not appeal his conviction, it becomes final thirty days after his plea of guilty); *Roberts v. Cockrell,* 319 F.3d at 694 ("If the defendant stops the appeal process before [filing a petition for writ of certiorari], the conviction becomes final when the time for seeking further direct review in the state court expires."). *See also Manuel v. State,* 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999) (holding that a defendant placed on deferred adjudication community supervision must raise issues relating to the original plea proceeding in an appeal taken when the community supervision is first imposed and not after subsequent revocation proceedings). Hence, Petitioner's plea of guilty and five-year sentence to deferred adjudication community supervision became final for purposes of the AEDPA's limitations period on December 12, 1992, and the one- year limitations period literally expired on December 12, 1993.

Nevertheless, for federal petitions filed after the enactment of the AEDPA on April 24, 1996, which attack convictions that became final thereto, the United States Court of Appeals for the Fifth Circuit has determined that an inmate must be accorded a one-year "grace period" within which to file his federal petition; that is, the petitioner must file his federal petition on or before April 24, 1997. *Felder v. Johnson,* 204 F.3d 168, 169 (5th Cir. 2000). Petitioner, however, did not file his petition until July 19, 2005, over eight years after the applicable limitations period had expired. Therefore,

unless Petitioner demonstrates that he is entitled to statutory or equitable tolling of the limitations period, his claims regarding the original guilty plea and order for deferred adjudication community supervision are time-barred.

Section 2244(d)(2) provides for tolling of the limitation period during the time when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. "Congress meant to include within the scope of § 2244(d)(2) those 'properly filed' applications, without respect to state nomenclature or the nature of the petitioner's state confinement, that, pursuant to the wording of § 2244(d)(2), seek 'review' of the 'pertinent judgment or claim.'" *Moore v. Cain*, 298 F.3d 361, 366-67 (5th Cir. 2002). "[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (emphasis in original).

Although Petitioner properly filed two state habeas applications, on April 11, 2002, and December 6, 2004, he is not entitled to tolling under 28 U.S.C. § 2244(d)(2) because neither application was filed before the limitations period expired on April 24, 1997. *See Scott v. Johnson*, 227 F.3d at 263 (holding that a state application filed after the one-year limitation period had expired did not toll the limitation period under § 2244(d)(2)).

Petitioner also argues that he is entitled to equitable tolling of the limitations period because the limitations period is not a jurisdictional bar, he was deprived of his first appeal because of ineffective assistance of counsel, and he is indigent, incarcerated, Hispanic, and proceeding *pro se*. Equitable tolling is a discretionary doctrine "that turns on the facts and circumstances of [each] particular case, . . . and does not lend itself to bright-line rules." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). "The doctrine . . . is applied restrictively and . . . is entertained only in cases

presenting 'rare and exceptional circumstances where it is necessary to preserve a plaintiff's claims when strict application of the statute of limitations would be inequitable.'" *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (quoting *Fierro v. Cockrell*, 294 F.3d 674, 682 (5th Cir. 2002) (internal quotation and alteration omitted)). The doctrine applies principally "where the [petitioner] is actively misled by the [respondent] about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (internal quotation marks omitted) (emphasis added). *See In re Wilson*, 442 F.3d at 875 ("A petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify."). The doctrine does not apply "where a petitioner has failed to pursue habeas relief diligently." *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002). Therefore, a court must examine each case on its individual facts and, guided by precedent, "determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling." *Fisher v. Johnson*, 174 F.3d at 713 (footnote omitted).

Attorney error or neglect is insufficient to warrant equitable tolling. *Cousin v. Lensing*, 310 F.3d at 849. *See United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) ("Ineffective assistance of counsel does not constitute a basis for equitable tolling."); *Moore v. Cockrell*, 313 F.3d 880 (5th Cir. 2002) (holding that counsel's delay in notifying petitioner of the result of a direct appeal does not constitute a basis for equitable tolling); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002) (holding that "counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [petitioner's] habeas petition in the district court within the one-year limitations period"); and *Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (holding that "ineffective assistance

on direct appeal in state court is not relevant to the question of tolling the AEDPA's statute of limitations").

Petitioner's allegations of indigence, incarceration, *pro se* status, and limited education are likewise insufficient to justify equitably tolling the limitations period. *See Turner v. Johnson*, 177 F.3d at 391 (providing that unfamiliarity with legal process, ignorance of the law, or lack of legal training does not merit equitable tolling); *Felder v. Johnson*, 204 F.3d at 171-72 (finding that ignorance of the law, lack of knowledge of filing deadlines, a prisoner's *pro se* status, lack of access to federal statutes and case law, incarceration prior to enactment of the AEDPA, illiteracy, deafness, a lack of legal training, and actual innocence claims will not support equitable tolling of the AEDPA's statute of limitations).

Moreover, the doctrine of equitable tolling "will not be applied where the [petitioner] failed to diligently pursue habeas corpus relief under § 2254." *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). Petitioner has provided no evidence that he was prevented by the State of Texas from timely raising his claims or that any "rare and exceptional" circumstances warrant equitable tolling of his claims from April 24, 1997, when the one-year period expired, until July 19, 2005, when he is deemed to have filed his petition. *See Phillips v. Donnelly*, 216 F.3d at 511 (holding that the burden of proving facts to support a claim of equitable tolling lies with the party seeking equitable tolling).

Accordingly, Petitioner's claims regarding his plea of guilty and the imposition of five years' deferred adjudication community supervision are time-barred under 28 U.S.C. § 2254(d)(1)(A).[4]

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[4]To the extent that Petitioner argues that he could not appeal from his plea of guilty and the imposition of five years' deferred adjudication community supervision in 1991 until after his community supervision was revoked and sentence imposed in 1995, his claims are still time-barred as discussed in the following section. *See Manuel v. State*, 994 S.W.2d at 661-62 (noting in 1999 that prior to 1987, when Texas Code of Criminal Procedure Art. 44.01(j) was enacted, a defendant placed on deferred adjudication community supervision could challenge the decision to defer adjudication or its terms and conditions only

2. Claims Regarding the Revocation of Deferred Adjudication Community Supervision

On November 6, 1995, the trial court held a hearing, adjudicated guilt, and sentenced Petitioner to 43 years' incarceration. Counsel for Petitioner filed a motion for new trial and notice of appeal. The Third Court of Appeals dismissed the appeal for want of jurisdiction on September 11, 1996, and Petitioner did not file a petition for discretionary review. Petitioner's claims regarding the revocation of his community supervision and 43-year sentence therefore became final on October 11, 1996, when his time for filing a petition for discretionary review expired, and he had to file his federal petition on or before October 11, 1997.

Petitioner, however, argues that because he was granted permission to file an out-of-time appeal pursuant to his first state writ application, his conviction became final for limitations purposes at the conclusion of the out-of-time appeal process, that is, on January 6, 2004, when his time expired for filing a petition for writ of certiorari.[5] Although he argues that the decision by the Fourth Circuit Court of Appeals in *Frasch v. Peguese,* 414 F.3d 518 (4th Cir. 2005), supports his argument, he has

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by moving for final adjudication and then appealing the adjudication, but the 1987 change in the law required a defendant placed on deferred adjudication community supervision to raise issues relating to the original plea proceeding only in an appeal taken when the deferred adjudication community supervision was first imposed).

[5]Following the revocation of his deferred adjudication community supervision and sentencing to 43 years' incarceration, Petitioner's appointed counsel filed a notice of appeal and subsequently an *Anders* brief. The Third Court of Appeals dismissed the appeal on September 11, 1996, and Petitioner did not file a petition for discretionary review. Five years later, on April 11, 2002, Petitioner filed a state application for writ of habeas corpus and alleged that he had been denied the right to appeal because his counsel had not properly notified him that he was filing an *Anders* brief so Petitioner could file his own *pro se* brief. On September 25, 2002, the Texas Court of Criminal Appeals granted Petitioner permission to file an out-of-time appeal. Petitioner contends that this granting of an out-of-time appeal "restored" him to the position he was originally in immediately after the revocation of his deferred adjudication community supervision on November 6, 1995. He then argues that his revocation actually became final for purposes of the AEDPA's limitations period on January 6, 2004, when his time expired for filing a petition for writ of certiorari following the out-of-time appeal. Petitioner also argues that because he filed his second state application on December 6, 2004, the limitations period was tolled until it was denied on June 29, 2005, and his federal petition was therefore timely filed on July 19, 2005.

overlooked the decision by the Fifth Circuit Court of Appeals in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004),[6] which is binding on this Court.

In *Salinas*, the Fifth Circuit determined that "[o]n its face, AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between." *Id.* at 429. "As a result, when a petitioner convicted in the Texas system acquires the right to file an 'out-of-time' PDR, the relief tolls the AEDPA's statute of limitations until the date on which the Court of Criminal Appeals declines to grant further relief, but it does not require a federal court to restart the running of AEDPA's limitations period altogether." *Id.* at 430 (footnote omitted). Thus, "if . . . an 'out-of-time' PDR is awarded only as a result of the collateral review process, limitations is tolled merely while the petitioner seeks to obtain that relief." *Id.* at 430. Although the decision in *Salinas* involved an out-of-time petition for discretionary review, its holding is equally applicable to an out-of-time appeal that "is necessarily the product of state habeas review . . . ." *Id.* at 431. *See Roach v. Quarterman*, No. 3:05-CV-2539-P, 2006 WL 2586087 at *2 n.5 (N.D. Tex. Sept. 8, 2006) (noting that the decision in *Salinas* is equally applicable to cases involving out-of-time PDRs or direct appeals obtained by state collateral review). Thus, for purposes of the AEDPA's statute of limitations, the revocation of Petitioner's deferred adjudication community supervision became final on October 11, 1996, when his time for seeking direct review expired, and the granting of permission to file an out-of-time appeal did not "restart" the limitations period. The

[6]In *Frasch v. Peguese*, 414 F.3d 518, 522-23 (4th Cir. 2005), the Fourth Circuit Court of Appeals rejected the Fifth Circuit's approach in *Salinas* because "it ignore[d] that two separate proceedings [were] involved"; that is, even though Frasch obtained the right to file an out-of-time appeal in a collateral proceeding, that proceeding ended with the order granting him leave to file the out-of-time appeal, which placed him in the same procedural posture as if he had timely filed his direct appeal.

one-year limitations period expired on October 11, 1997, and the instant petition is clearly time-barred unless Petitioner demonstrates that he is entitled to statutory or equitable tolling.

Petitioner is not entitled to statutory tolling under § 2244(d)(2) because he filed both of his state habeas applications after the one-year limitations period expired. *Scott v. Johnson*, 227 F.3d at 263.

Petitioner is not entitled to tolling for the time period during which his first state habeas application and the resulting out-of-time appeal were pending because neither was filed before the one-year limitations period expired. *See Miles v. Dretke*, No. 3:03-CV-2725-K, 2004 WL 1041635 (N.D. Tex. May 5, 2004) (adopting the findings and conclusions of the magistrate judge, 2004 WL 827941 at *3 (N.D. Tex. April 15, 2004)) (finding that when the state habeas application that seeks permission to file an out-of-time PDR is filed after the one-year limitation period has expired, neither the state habeas application nor the out-of-time PDR will toll the limitation period). *See also Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) ("A state court's subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application.").

As previously discussed, Petitioner's claims of indigency, incarceration, *pro se* status, limited education, and limited ability to speak English are insufficient to warrant equitable tolling. Moreover, he has not demonstrated that he diligently pursued relief in either state or federal court. *Melancon v. Kaylo*, 259 F.3d at 408. Petitioner was originally placed on deferred adjudication community supervision on November 12, 1991, and his community supervision was revoked on November 6, 1995, but he did not file his first state habeas application until April 11, 2002, over six years later. Furthermore, after Petitioner's discretionary review was refused on October 8, 2003, following his

out-of-time appeal, he did not file another state habeas application until December 6, 2004, over one year later. *See Coleman v. Johnson*, 184 F.3d at 403 (holding that a petitioner was not entitled to equitable tolling where he did not explain the six-month delay between receiving notice of the denial of his state appeal and filing his federal petition). Petitioner has provided no explanation for these lengthy delays and none is apparent from the record. "Equity is not intended for those who sleep on their rights." quoting *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999).

CONCLUSION

Accordingly, the Court finds that the above-styled and -numbered case should be DISMISSED with prejudice pursuant to 28 U.S.C. § 2244(d)(1). All relief not expressly granted is denied and any pending motions are hereby denied.

SO ORDERED.

Dated October 23, 2006.

SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

NO. 07 6984

IN THE

SUPREME COURT OF THE UNITED STATES

CARLOSJIMENEZ V. NATHANIEL QUARTERMAN, Dir. TDCJ CID.

DECLARATION PURSUANT TO 28 U.S.C. § 1746

"I, Declare my name is Carlos Jimenez and I am over the age of 21 of sound mind and capable of making this declaration and I am personally acquinted with the facts herein stated."

1. "On August 21, 2007 I Executed by my signature the above Styled petition for writ of certiorari and placed it in the Telford Unit Indigent Mail BOx at my housing pod on 18 Dorm on the same day of August 21, 2007."

2. "I personally observed the mailroom ladies come to the indigent mail box on 18 dorm and remove the mail from the mail boxes both regular and indigent on the next day of August 22, 2007 on or about 7:30 AM."

3. "I am indigent so there were no pre paid postage on the writ envelope until it went to the Law Library for indigent processing."

4. "On August 23rd I received my indigent envelope back with the notice that the prepaid postage was applied to my envelope by the Telford Unit Indigent Mail prison officials and it was in fact mailed indigently in my behalf."

5. "I am an inmate confined in an institution and I deposited my petition for certiorari with all the documents signed and dated in the institution's internal mail system on August 21, 2007 before the last day for filing August 23, 2007 and first class postage had been pre paid."

"I declare Under penalty of perjury that the foregoing is true and correct." Executed on September 28, 2007.

Carlos Jimenez

Carlos Jimenez #745196

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-0001

September 28, 2007

Re: Carlos Jimenez v. Nathaniel Quarterman

Dear Honorable Clerk of the Court,

Petitioner in the above cause received you letter of instruction and apologizes for any inconvenience to the Clerk and the Court.

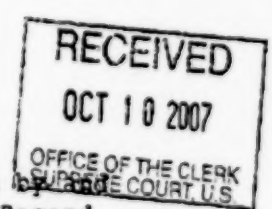
Petitioner being indigent, incarcerated, and acting in pro se believed that his declaration on the Conclusion of his petition for a writ of certiorari on page 25 would be sufficient to invoke the mail box rule, however being mistaken would now resubmit his application with a separate Declaration pursuant to 28 U.S.C. § 1746 and would request the HOnorable Clerk to file Docket his petition for writ of Certiorari.

Petitioner did in fact execute and deliver his document in the Telford Unit Indigent Mail Box on August 21, 2007, however the mailroom does not pick the mail up till the following day August 22, 2007 and then it is delivered after sorting to the Unit Law Library, where pre paid postage is then attached to the envelope and processed by them and sent back to the mailroom to be mailed out.

Petitioner has no control over the time it takes after he deposits his mail in the indigent mail box on his housing location.

Thank you for your valuable time and consideration in this most important matter and Petitioner appreciates you for taking into consideration Petitioner is not a trained attorney and is handicapped in his ability to prepare his pleadings.

Sincerely,



Carlos Jimenez #745186
Telford Unit
P.O. Box 9200
New BOston, Texas 75570-9200

cc: Nathaniel Quarterman by and through his Attorney of Record

Texas Attorney General

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

August 31, 2007

Carlos Jimenez
#745196
Telford Unit
P.O. Box 9200
New Boston, TX 75570-9200

RE: Carlos Jimenez v. Nathaniel Quarterman

Dear Mr. Jimenez:

The above-entitled petition for a writ of certiorari was postmarked August 24, 2007 and received August 30, 2007. The papers are returned for the following reason(s):

The petition was not timely received nor postmarked by the due date. The date of the lower court judgment or order denying a timely petition for rehearing was May 25, 2007. Therefore, the petition was due on or before August 23, 2007. Rules 13.1., 29.2 and 30.1.

An otherwise untimely petition being filed by an inmate confined in an institution may not be docketed unless it was timely deposited in the institution's internal mail system and is accompanied by a notarized statement or declaration setting forth the date of deposit in the institution's internal mail system and stating that first class postage has been prepaid. Rule 29.2. The petition may not be filed until the required affidavit or declaration is received.

Sincerely,
William K. Suter, Clerk
By:

Gail Johnson
(202) 479-3038

Enclosures

OPPOSITION BRIEF

RESPONSE REQUESTED

[redacted]

Supreme Court, U.S.
FILED
FEB 6 2008
OFFICE OF THE CLERK

No. 07-6984

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS JIMENEZ,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in denying a certificate of appealability on the question of whether the AEDPA statute of limitations contained in 28 U.S.C. § 2244(d)(1)(A) commences after the completion of an out-of-time appeal obtained through post-conviction state habeas proceedings; and

2. Whether the Fifth Circuit erred in denying a certificate of appealability on the question of whether Jimenez is entitled to equitable tolling of the one-year limitations period of 28 U.S.C. § 2244(d)(1)(2).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, ("the Director"), respectfully files this brief in opposition to Carols Jimenez's ("Jimenez") petition for writ of certiorari.

JURISDICTION

This Court has jurisdiction under the provisions of 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 240 (1998).

STATEMENT OF THE CASE

I. State court proceedings.

On November 12, 1991, after pleading "guilty" to the charge of burglary of a habitation, and "true" to the enhancement paragraph alleging one prior felony, the 119th District Court of Tom Green County, Texas, placed Jimenez on deferred adjudication probation for five years, pursuant to a plea agreement, in cause number CR91-0528-B, styled *The State of Texas v. Carlos Jimenez*. Tr 8-20.[1] Jimenez did not appeal from this order.

On November 6, 1995, the trial court held a hearing on the State's motion to proceed with an adjudication of guilt, adjudicated guilt,[2] and sentenced Jimenez to forty-three years confinement. Tr 35. Jimenez filed a motion for new trial and notice of appeal. Tr 47-49. The Third Court of Appeals dismissed the appeal for want of jurisdiction on September 11, 1996, finding: the notice of appeal did not preserve for review the district court's rulings on

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[1] "Tr" refers to the Clerk's Record in this case, followed by the relevant page number(s).

[2] Jimenez entered pleas of "not true" to the allegations in paragraphs one and three, and pleas of "true" to the allegations in paragraphs two and four in the State's Motion to Proceed. Tr 35.

any pretrial motions and did not state that the court gave appellant permission to appeal, pursuant to TEX. R. APP. PROC. 40(b)(1), thus the appellate court had jurisdiction only to consider issues concerning the district court's jurisdiction, and no basis for such challenge were raised or found by the court on review of the records. *Jimenez v. State*, No. 03-96-00123-CR (Tex. App.—Austin, 1996). The court noted that appellate counsel had filed an *Anders* Brief,[3] that such brief was delivered to appellant, that appellant was advised of his right to examine the record and file a *pro se* brief, and that no *pro se* brief had been filed. *Id.* at 2. Jimenez did not file a petition for discretionary review.

Almost six years later, on April 11, 2002, Jimenez filed a state application for writ of habeas corpus arguing that he had been denied a meaningful appeal when his counsel failed to comply with the requirements of *Anders* by failing to notify Jimenez of his right to file a *pro se* brief. *Ex parte Jimenez*, Application No. 53,212-01, at 2. The Court of Criminal Appeals granted Jimenez relief in the form of an out-of-time appeal. *Ex parte Jimenez*,No. 74,433, slip op. (Tex. Crim. App. Sept. 25, 2002).

Jimenez's counsel filed an *Anders* brief in his out-of-time appeal also. *Jimenez v. State*, No. 03-02-00733-CR, 2003 WL 21087604 (Tex. App.– Austin 2003); *Ex parte Jimenez*, Application No. 53,212-02, at 87-90 (copy of appellate opinion). Jimenez filed a *pro se* brief challenging the voluntariness of his guilty plea and denial of due process at both his guilty plea hearing and his later sentencing hearing. *Jimenez v. State*, 2003 WL 21087604 at *2. The Court of Appeals subsequently issued an opinion affirming Jimenez's conviction

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[3] Jimenez's attorney on appeal filed an *Anders* brief in which he concluded that the appeal was wholly frivolous and without merit. *Jimenez v. State*, No. 03-96-00123-CR, slip op. at *1; *see Anders v. California*, 386 U.S. 738 (1967).

in an unpublished opinion on May 15, 2003. *Id.* His petition for discretionary review ("PDR") was ultimately refused on October 8, 2003. *Jimenez v. State*, PDR No. 937-03.

Over a year later, on December 6, 2004, Jimenez filed a state writ application for writ of habeas corpus challenging this conviction raising for the first time claims of ineffective assistance of counsel at the revocation and punishment proceedings as well as claims he had raised in his out-of-time appeal including involuntary plea, ineffective assistance of counsel at the plea proceeding, and denial of due process based on judicial bias. *Ex parte Jimenez*, Application No. 53,212-02, at 17. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on June 29, 2005. *Id.*, at cover.

II. Federal court proceedings.

Jimenez filed his federal habeas petition on July 19, 2005, challenging his burglary conviction and claiming that: his plea was involuntary, he was denied effective counsel at the plea proceeding, he was denied due process at revocation because the judge was biased and would not consider a sentencing agreement, and he was denied effective counsel at revocation. *Jimenez v. Quarterman*, No. 6:05-CV-052-C, at 3-4 (N.D. San Angelo, October 23, 2006) (partial opinion located at Cert. Pet. Appendix B); Appendix A (District court order denying federal habeas petition as time-barred). The District Court, relying in part on the Fifth Circuit's holding in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004), found that Jimenez's petition was time-barred. *Id.* at 12, 14. The court also found that equitable tolling was not warranted because Jimenez had neither demonstrated sufficiently rare and exceptional circumstances nor diligence. *Id.* at 8-10, 13-14. The district court dismissed Jimenez's federal writ petition with prejudice as time-barred. *Id.* at 14.

Jimenez applied for a certificate of appealability ("COA") to appeal the dismissal of his petition as untimely filed but a COA was denied by both the federal district court, Cert. Pet. Appendix A, and the United States Court of Appeals for the Fifth Circuit. Cert. Pet. Appendix A (*Jimenez v. Quarterman*, No. 06-11240, order filed May 25, 2007); Appendix B (Petitioner's motion for COA in the Fifth Circuit).

Jimenez now petitions this Court for a writ of certiorari, complaining that the Fifth Circuit erred when it denied him a certificate of appealability ("COA").

SUMMARY OF ARGUMENT

Jimenez contends that the Fifth Circuit has entered a decision in conflict with the United States Courts of Appeals for the Fourth, and Tenth Circuits on the same important issue: whether an out-of-time appeal obtained through post-conviction habeas proceedings constitutes "direct review" under Section 2244(d)(1)(A), such that the AEDPA limitations period is reset or restarted at the conclusion or expiration of such review. Pet. Cert. at 16. He also argues he is entitled to equitable tolling. Pet. Cert. at 15-24. There is no compelling reason, however, for this Court to exercise its jurisdiction to review the procedural disposition of Jimenez's federal habeas petition.[4]

First, to the extent the Fifth Circuit's opinion in *Salinas*, on which the district court relied in part in dismissing Jimenez's petition, conflicts with decisions from the Fourth and Tenth Circuits, the split between the Circuits is very limited.[5] Moreover, the Fifth Circuit

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[4] This Court denied a petition for certiorari review of the same issue in *Cate v. Quarterman*, No. 07-5914, on January 14, 2008.

[5] Jimenez's argument that the split in the Circuits is broader on this particular issue is not supported by the cases he cites, as further addressed in the argument below. *See* Pet. Cert. at 11-12, citing *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir. 2003) (holding that a sentence review is not direct review under Section 2244(d)(1)(A) looking to state law

provides the better interpretation of Section 2244(d)(1)(A). It promotes the purposes of the AEDPA statute of limitations, is consistent with principles of statutory construction, and enjoys support from several other Circuits. The approach of the Fourth and Tenth Circuits hinders the purposes of the AEDPA, undermining the interest in finality and creating a great potential for delay in the adjudication of federal claims. Because the dismissal of Jimenez's petition was a correct application of Section 2244(d)(1)(A), Jimenez presents no compelling reason for this Court to exercise its jurisdiction to review the issue in the context of this case.

Second, even if it applies to the AEDPA limitations period, equitable tolling is a discretionary and fact-intensive doctrine and the District Court did not err in denying Jimenez equitable tolling on the facts of this case. Jimenez presents no compelling reason for this Court to exercise its jurisdiction to review the issue in the context of this case.

For these reasons, Jimenez's petition for certiorari review should be denied.

ARGUMENT

Rule 10 of this Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefore. As demonstrated below, there is no compelling reason for this Court to exercise its discretion to review this case. Accordingly, certiorari review should be denied.

The federal district court dismissed Jimenez's federal habeas petition finding that it was barred by the AEDPA statute of limitations. Appendix A at 14. The AEDPA provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

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distinguishing between sentence review and direct appeal); *White v. Klitzke*, 281 F.3d 920, 923 (9th Cir. 2003) (holding that petitioner was not entitled to ninety days for filing petition for certiorari from denial of a state habeas application under Section 2244(d)(2)).

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The district court found that Jimenez's claims relating to the revocation of his deferred-adjudication community supervision and punishment were time-barred. *Jimenez v. Quarterman*, No. 6:05-CV-052-C, at 3-4. Relying on the Fifth Circuit's holding in *Salinas*– that an out-of-time petition for discretionary review ("PDR") tolls the AEDPA statute of limitations but does not require a federal court to restart the limitations period– the district court rejected Jimenez's argument that his AEDPA limitations period was reset when the Court of Criminal Appeals granted his out-of-time appeal and did not begin to run until his out-of-time appeal had concluded. *Id.* 11-13. Recognizing that the Fifth Circuit in *Salinas* addressed the limitations period only in the context of an out-of-time PDR, the

district court concluded that the holding applied equally to an out-of-time appeal because the out-of-time appeal was likewise a product of a state habeas proceeding. *Id.* at 12. Following the Fifth Circuit's holding in *Salinas*, the district court found that Jimenez's claims regarding the revocation of his community supervision and the forty-three-year sentence became final on October 11, 1996, when his time for filing a PDR expired. *Id.* at 11. Thus, to be timely, his federal petition raising these claims should have been filed by October 11, 1997. *Id.* The district court found that Jimenez's limitations period was not statutorily tolled under Section 2244(d)(2) for either his first state habeas application and subsequent out-of-time appeal or the second state habeas application, because they were all filed after the one-year limitations period had expired. *Id.* at 13.

The District court also concluded that Jimenez's arguments– that he was deprived of his first appeal because of ineffective assistance of counsel, and that he was indigent, incarcerated, Hispanic, and proceeding *pro se* –did not entitle him to equitable tolling. *Id.* at 8-10. Additionally, the District court found that Jimenez had not been diligent in pursuing his claims: he waited over six years after his revocation to file his first state habeas application seeking an out-of-time appeal, and over one year after the Court of Criminal Appeals refused his PDR on his out-of-time appeal to file his second state habeas application. *Id.* at 13-14. Jimenez had provided no explanation for the lengthy delays and none were apparent from the record. *Id.* at 14.

The District court also found that Jimenez's claims relating to his guilty plea proceeding[6] were time-barred because he had not appealed from the order placing him on

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[6] Jimenez has conceded that even if not time-barred these claims lack merit. *See* Pet. Cert. at 14; Petitioner's Petition for Certificate of Appealability in the Fifth Circuit, at 4. Out of an abundance of caution, the Director's arguments will address these claims as well.

deferred-adjudication probation such that the order had become final thirty days after it was entered, or on December 12, 1991. *Id.* at 6-7. Thus, in order to be timely, Jimenez had to file his federal petition raising such claims by April 24, 1997, because his conviction was final before the AEDPA was enacted. *Id.* at 7. It was not. It was not filed until July 19, 2005, over eight years after the limitations period had expired. *Id.* Again, the District court found that Jimenez was not entitled to statutory tolling for these claims because his two state habeas applications were filed only after his limitations period had expired. *Id.* at 8. And again the District court found that Jimenez was not entitled to statutory tolling for these claims. *Id.* at 8-10.

I. The District court's dismissal of Jimenez's federal habeas petition as time-barred and the Fifth Circuit's denial of a certificate of appealability does not warrant review by this Court because any split between the Circuits regarding whether an out-of-time appeal restarts the AEDPA limitations period is extremely narrow and the Fifth Circuit has applied the predominant, and better interpretation of Section 2244(d)(1)(A).

To the extent the Fifth Circuit's opinion in *Salinas*, on which the district court relied in dismissing Jimenez's petition, conflicts with the Fourth Circuit's opinion in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005), and the Tenth Circuit's opinion in *Orange v. Calbone*, 318 F.3d 1167 (10th Cir. 2003), as Jimenez argues,[7] the split between the Circuits is very limited and does not merit review by this Court at this time. Moreover, the Fifth Circuit provides the better interpretation of Section 2244(d)(1)(A). Holding that an

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[7] Jimenez also attempts to distinguish his case from *Salinas* by pointing out that he was denied not only a petition for discretionary review to the Court of Criminal Appeals, but an appeal to the intermediate appellate court as well. Pet. Cert. at 10. The District court, however, determined that this distinction did not lead to a different result because the same reasoning applied. *Jimenez v. Quarterman*, 6:05-cv-00052, slip op. at 12 (N.D. Tex 2006); Appendix I (the copy in the Petitioner's Appendices that the Director received was not complete).

out-of-time appeal obtained through post-conviction habeas proceedings does not constitute "direct review" under Section 2244(d)(1)(A), triggering the limitations period, but rather collateral review under Section 2244(d)(2), tolling the limitations period, promotes the purposes of the AEDPA statute of limitations. It is consistent with principles of statutory construction and enjoys support from several other Circuits. Because the dismissal of Jimenez's petition was a correct application of Section 2244(d)(1)(A), Jimenez presents no compelling reason for this Court to exercise its jurisdiction to review the issue in the context of this case.

This Court has stated that "[o]rdinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears." *Carey v. Saffold*, 536 U.S. 214, 220, 223 (2002)(determining that California's "reasonable" time period for filing an appeal in habeas proceeding functioned such that collateral review would be "pending" under Section 2244(d)(2) only if habeas appeal was filed in reasonable amount of time as determined by federal courts). The Fifth, Fourth, and Tenth Circuits, while notably reviewing different states' laws regarding different out-of-time appeal procedures, also focus on different aspects of how those state procedures "function." And they rely, to different degrees, on the state's characterization of the procedures.

In *Salinas v. Dretke*, after his AEDPA limitations period had expired, the Texas Court of Criminal Appeals granted Salinas relief on state habeas in the form of allowing him to file an out-of-time PDR. *Salinas*, 354 F.3d at 428. The Fifth Circuit acknowledged that granting the out-of-time PDR, under Texas law, placed Salinas back in the midst of direct review. *Id.* at 429. But the Fifth Circuit found that under Texas law, the only way to obtain an

out-of-time PDR was through a collateral proceeding,[8] and that "[s]o long as the petitioner is being held pursuant to the same state court judgment, nothing in the AEDPA allows for a properly initiated limitations period to be terminated altogether by collateral state court action." *Id.* at 430. Thus, the Fifth Circuit concluded that an out-of-time petition for discretionary review ("PDR") is part of post-conviction or other collateral review and not part of direct review, thus tolling, but not delaying the start of, the AEDPA limitations period. *Id.* at 429-31.

Because the Fifth Circuit found that an out-of-time appeal in Texas is part of the collateral review process merely tolling the limitations period under Section 2244(d)(2), it determined that the tolling ended when the state process ended, in that case, when the state courts declined to exercise further review by refusing PDR. *Salinas*, 354 F.3d at 430 n.6. Section 2244(d)(2), by its terms, does not provide for additional tolling for time to file a

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[8] After reviewing the relevant state law, the Fifth Circuit determined that the only way to obtain an out-of-time PDR was through a collateral proceeding. *Salinas*, 354 F.3d at 430. The reasoning in *Salinas* applies equally to an out-of-time direct appeal to the intermediate appellate courts of Texas.

The Texas Rules of Appellate Procedure do not provide for filing or obtaining permission to file an out-of-time notice of appeal or PDR. *See Salinas*, 354 F.3d at 431. Those rules set short specific time-limits for filing a notice of appeal and a PDR. *Id.* (citing Tex. R. App. P. 26.2; 68.2). The rules permit a motion for extension of time to file a notice of appeal and a PDR, but such a motion must be filed within fifteen-days after the expiration of the original deadline. *Id.* (citing Tex. R. App. P. 68.2(c); Tex. R. App. P. 26.3). Once the time has passed to file such an extension, the only way to secure an out-of-time appeal in Texas is via a post-conviction application for writ of habeas corpus. *See Salinas*, 354 F.3d at 431 (citing *Ashorn v. State*, 77 S.W.3d 405, 409 (Tex. App. — Houston [1st Dist.] 2002, pet. ref'd)(regarding out-of-time PDR)); *also see Ater v. Eighth Court of Appeals*, 802 S.W.2d 241, 243 (Tex.Crim.App.1991) (out-of-time appeal from felony conviction may be sought by filing a writ of habeas corpus pursuant to Texas Code of Criminal Procedure, Article 11.07).

petition for certiorari review in the Supreme Court to review the state court's decision on collateral review.[9]

A. The Fifth Circuit's approach promotes the purposes of the AEDPA.

The Fifth Circuit's analysis promotes the purposes of the AEDPA statute of limitations, to "further the principles of comity, finality and federalism." *See Duncan v. Walker*, 533 U.S. 167, 178 (2001)(addressing statute of limitations) (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)). Specifically, the Fifth Circuit's holding in *Salinas* promotes the exhaustion of state court remedies, while respecting the interest in the finality of state court judgments, by requiring that the petitioner be diligent in pursuing relief including out-of-time appeals.

Under the Fifth Circuit's analysis, if the out-of-time appeal were sought before the expiration of the AEDPA limitations period, the limitations period would be tolled during the pendency of the out-of-time appeal, allowing the petitioner to exhaust his state court remedies. If the limitations period had expired before the petitioner filed the state writ application seeking an out-of-time appeal, then the question would be whether the situation called for the application of a different triggering event, such as the petitioner's ability to discover the factual predicate through the exercise of due diligence under Section 2244(d)(1)(D). The requirement of due diligence fosters finality and keeps the petitioner from sitting on a claim for a lengthy period of time. Furthermore, where relief from the state

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[9] Jimenez contends that he was denied his right to file a petition for certiorari to the Supreme Court from the state court's denial of PDR. Pet. Cert. at 10. Although under Section 2244(d)(2) his AEDPA limitations would not be tolled during the time he had to file such petition, he was not denied the opportunity to do so.

court conviction is obtained through an out-of-time appeal, there would be a new judgment and a new AEDPA limitations period in which to challenge it.

B. The Fifth Circuit's approach is consistent with principles of statutory interpretation.

Under principles of statutory construction, the Fifth Circuit is correct that nothing in the AEDPA suggests that finality under Section 2244(d)(1)(A) is an event that can occur more than once. First, Congress used the definite article, "the" in Section 2244(d)(1)(A), indicating that it was an event that would only occur once, whereas it used the indefinite article "a" in Section 2244(d)(2) acknowledging that there may be more than one state habeas application or other collateral proceeding attacking a conviction.

Further, Congress used the term "direct review," not "direct appeal," emphasizing the direct and linear nature of the review rather than the standards under which the case is reviewed. *See Summers v. Schriro*, 481 F.3d 710, 715 (9th Cir. 2007) (Arizona of-right habeas proceeding for criminal defendants who pleaded guilty was form of direct review for limitations purposes under the AEDPA because it helped ensure that state courts had full opportunity to consider state prisoners' claims before they were presented to federal courts and was governed by short, definite deadlines). Although an out-of-time appeal is reviewed under the standards used in a direct appeal, at least in Texas, it is not direct, because it can only be obtained through collateral proceedings. Black's Law Dictionary defines "direct" as "[i]mmediate, proximate, by the shortest course; without circuity; operating by an immediate connection or relation, instead of operating through a medium; . . . In the usual or natural course or line; immediately upwards or downwards; . . . without any intervening medium, agency or influence. . . ." Black's Law Dictionary, Sixth Ed. Thus, where out-of-

time appeals can only be obtained through an intervening collateral proceeding, as in Texas, the resulting appeal is not "direct."

Finally, Section 2244(d)(1)(A) does not contain any qualifying words requiring that the direct review process conclude or expire without error or constitutional infirmity. If such a requirement were inferred, claims raised in federal habeas petitions claiming constitutional infirmity on appeal would have to be addressed on their merits in order for the court to determine whether the statute of limitations had even begun to run.

C. The Fifth Circuit's approach finds support in other Circuits.

The Fifth Circuit's focus on the origin of the out-of-time appeal and its premise that the AEDPA limitations period is linear and, once begun, cannot be extended by state court action, except to toll the period under Section 2244(d)(2), finds support in other Circuits as well. The Sixth Circuit began by focusing on the linear nature of the limitations period and the principle of diligence the limitations statute promoted, then finally determined that the process for reopening or obtaining a delayed appeal in Ohio was in fact a collateral proceeding, not part of the direct appeal. *See Lopez v. Wilson*, 426 F.3d 339, 341, 342-349 (6th Cir. 2005)(en banc, per curiam)(determining that there was no clearly established right to counsel for filing a Rule 26(B) motion because it was a collateral proceeding, providing historical summary).[10] Before the Sixth Circuit determined, in *Lopez*, that motions for delayed appeals, under Ohio Supreme Court Rules of Practice (4)(a), or a motion to reopen,

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[10] The Sixth Circuit case cited by Jimenez, *Miller v. Collins*, 305 F.3d 491 (6th Cir. 2002), was discussed in *Lopez* as reflecting concerns that the initial determination that the out-of-time appeal procedure was part of the direct appeal was incorrectly decided because it was at odds with the structure and function of the AEDPA. *See* Pet. Cert. at 11; *Lopez*, 426 F.3d at 349. This does not support Jimenez's contention that there is a sharp contrast beteen the Fifth Circuit and her sister courts. *See* Pet. Cert. at 11.

under Rule 26(B) of the Ohio Rules of Appellate Procedure, were collateral proceedings, it had characterized such proceedings as being part of direct review, except that for purposes of the AEDPA limitations period, it was treated as a collateral proceeding merely tolling the period instead of restarting it. *See Id.* at 343-46; *Searcy v. Carter*, 246 F.3d 515, 516-19 (6th Cir. 2001), *cert. denied*, 534 U.S. 905 (2001). In *Searcy*, the Sixth Circuit quoted *Bronaugh v. Ohio*, 235 F.3d 280, 286 (6th Cir. 2000), holding that it is important to ensure that the petitioner would not benefit from his delay in filing his Rule 26(B) motion. *Searcy*, 246 F.3d at 519. Further, it found that retriggering the limitations period at the conclusion of a motion for delayed appeal proceeding, which could be filed years after conviction, would effectively eviscerate the AEDPA's statute of limitations. *Id.* More recently, in *DiCenzi v. Rose*, 452 F.3d 465, 469 (6th Cir. 2006), the Sixth Circuit stated, albeit in *dicta*, as it had implied in *Lopez*, that a motion for an out-of-time appeal based on ineffective assistance of appellate counsel, under Ohio law, does not restart the AEDPA limitations period, even if the motion is granted.

The Seventh Circuit, in *Teas v. Endicott*, 494 F.3d 580, 582-83 (7th Cir. 2007), recently held that a belated appeal granted through collateral habeas proceedings in Wisconsin did not restart the AEDPA limitations period. The Seventh Circuit focused on the linear nature of the limitations period and found that nothing in the AEDPA implied that the "conclusion of direct review" in state court could happen more than once or that the limitations period is "reopened" if the state court engages in multiple rounds of review that it calls "direct." *Teas*, 494 F.3d at 581. The court further rejected the notion that the way the state court characterizes the review determines whether it is direct or collateral for the purposes of the AEDPA limitations. *Id.* at 582. Thus, it rejected the approaches taken by the Fourth Circuit in *Frasch* and the Tenth Circuit in *Orange*. *Id.* However, the Seventh Circuit

also noted that it was not necessary in *Teas* to reject a state's classification of the process as direct appeal because Wisconsin itself recognized the procedure as a form of collateral review. *Id.*

Also, the Eighth Circuit in *O'Neal v. Kenny*, 501 F.3d 969 (8th Cir. 2007), recently found that Nebraska's grant of a new direct appeal did not constitute direct review for purposes of the AEDPA. In that case, *O'Neal* failed to file for direct appeal, but two weeks after the AEDPA limitations period had expired, sought state post-conviction relief, which was still pending four years later when he filed for federal habeas relief. His federal petition was dismissed as untimely. *Id.* at 970. *O'Neal* then obtained post-conviction relief in the form of "a new direct appeal" from the state courts, based on ineffective assistance of counsel in failing to submit an adequate poverty affidavit prior to his original appeal. *Id.* The Eighth Circuit held that, under Nebraska law, a new direct appeal does not constitute direct review for AEDPA purposes. *Id.* The Eighth Circuit found that the Nebraska Supreme Court had explicitly held that a granting of a new direct appeal constitutes a new appellate process and does not reinstate the original appellate process, does not disturb the original criminal judgment, and does not reverse the clock, but places the inmate on a new appellate path. *Id.* at 971.

Though the Eighth Circuit's determination purports to rest on state law, the new direct appeal under Nebraska law appears to be the functional equivalent of the out-of-time appeals addressed by the Fifth Circuit, absent the legal fiction of turning back the clock. Thus, this decision implicitly supports the Fifth Circuit's premise that the conclusion or expiration of "direct review" is an event the AEDPA contemplated occurring only once, such that further rounds of review equivalent to "direct appeal" would not constitute "direct review" under Section 2244(d)(1)(A).

D. The holdings of the Fourth and Tenth Circuits do not promote the purposes of the AEDPA, nor do they have much support.

The holdings of the Fourth and Tenth Circuits, that an out-of-time appeal obtained through post-conviction habeas proceedings constitutes "direct review" under Section 2244(d)(1)(A), triggering the limitations period, does not promote the purposes of the AEDPA statute of limitations. Nor do they find much support.

In *Orange*, the petitioner failed to file a notice of appeal, but was granted an appeal out of time when he filed an application for post-conviction relief seeking an appeal out of time, under Oklahoma Rule of Appellate Procedure 2.1(E)(1), over eighteen months after his time for seeking direct review had expired. *Orange*, 318 F.3d at 1169. The Tenth Circuit, deferring to the underlying state court characterization of the procedure, found that the out-of-time appeal *Orange* obtained was considered part of the direct appeal process under Oklahoma law. *Id.* at 1171. The procedure was provided in the Rules of the Court of Criminal Appeals. *Id.* And, if granted in the direct appeal context under Rule 2.1(E)(1), the defendant would be essentially placed in the same procedural posture as if he had timely pursued a direct appeal from his convictions. *Id.* He would be bound by the same procedural rules, be able to raise the same substantive claims to be reviewed under the same standards, be addressed as appellate, and face the same prospect of having the conviction affirmed or reversed. *Id.* Because the petitioner would essentially be placed in the same procedural and substantive posture as if his time for seeking direct appeal had not expired, the Tenth Circuit found that an appeal out of time was therefore part of the "direct review" process within the meaning of Section 2244(d)(1)(A).[11] *Id.* at 1170-73.

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[11] Although the Tenth Circuit addressed both the nature of the review on out-of-time appeal and the origin of the right to file the appeal, the Fifth Circuit noted that any

In *Frasch*, the petitioner failed to file an application for leave to appeal his guilty-plea conviction before the thirty-day deadline expired, which would have been the proper route for seeking direct review of his conviction and sentence under Maryland law. *See Frasch*, 414 F.3d at 520-21. Frasch was granted thirty days to file a belated application for leave to appeal when, almost ten years later, he filed a petition for postconviction review claiming ineffective assistance of counsel for failure to file an application for leave to appeal. *Id.* The application was timely filed, read, considered, and denied. *Id.*

The Fourth Circuit's analysis began with the premise that a federal court must look to state (Maryland) law to determine what constitutes "direct review" for purposes of 2244(d)(1)(A), and that the nature of the review conducted determined whether it was collateral or direct. *Frasch*, 414 F.3d at 522. That court found that Maryland considered a defendant's timely application for leave to appeal to be direct review, and that the Maryland Circuit Court granted *Frasch* a new thirty-day deadline within which he timely filed an application for leave to appeal which was read, considered, and denied by the Court of Special Appeals. *Id.* Thus, the Fourth Circuit found that the application constituted direct review and that the AEDPA limitations did not begin until the time for seeking further direct review expired. *Id.*

The Fourth Circuit did not consider it important that the original deadline prescribed by state rule for direct appeal had expired ten years earlier or that the origin of the new

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inconsistency between the conclusion in *Salinas* and *Orange* was due to the underlying differences in state laws. *See Salinas*, 354 F.3d at 431 n.9. The distinction is that an out-of-time appeal is not provided for in the Texas Rules of Appellate Procedure but is provided for in the Oklahoma Rules of Appellate Procedure and, consequently, can be part of Oklahoma's direct review process. *Id.*

deadline to file an out-of-time motion for leave to appeal was a collateral proceeding. *Id.* at 522. The court acknowledged that the belated application was obtained through a collateral proceeding.[12] *Id.* at 522-23. However, it was not this *in*direct nature of review with which the Fourth Circuit was concerned. Because the state courts treated *Frasch*'s application for leave to appeal in every respect as a timely one, the Fourth Circuit concluded the state court had engaged in direct review, the conclusion of which would trigger the start of the AEDPA statute of limitations. *Id.* at 523.

The Fourth Circuit explicitly rejected the *Salinas* approach stating that *Salinas* ignored the fact that two separate proceedings were involved. *See Frasch*, 414 F.3d at 522. In doing so, however, the Fourth Circuit implicitly rejected the premise on which the Fifth Circuit's decision in *Salinas* was based, that nothing in the AEDPA allows for a properly initiated limitations period to be restarted by collateral state court action. The dissent in *Frasch*, however, argued that the origin of the right to file an out-of-time appeal was precisely the issue on which the court should have focused, rather than the nature of the review. *See Frasch*, 414 F.3d at 525-528 (Niemeyer, J., dissenting). Thus, the dissent in *Frasch* implicitly supported the Fifth Circuit's reasoning and decision in *Salinas*.

1. These holdings do not promote the purposes of the AEDPA.

The holdings of the Fourth and Tenth Circuits, that an out-of-time appeal, obtained through a collateral proceeding subject to no filing deadlines, is "direct review" for purposes of triggering the limitations period under Section 2244(d)(1)(A), and their deference to state

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[12] Maryland's rules of appellate procedure provide no mechanism for extending the period for filing a direct appeal and absent specific authority, the Maryland courts found that the appeals period may not be extended on direct review. *See Frasch*, 414 F.3d at 526 (Niemeyer, J., dissenting) (citing *Michael v. State*, 584 A.2d 1317, 1318 (Md. App. 1991)).

court characterizations of the proceedings, do not promote the purposes of the AEDPA statute of limitations: to "further the principles of comity, finality and federalism." *See Duncan*, 533 U.S. at 178. They do not promote the exhaustion of state remedies while respecting the interest in the finality of state court judgments. They do not encourage diligence in seeking out-of-time appeals in the state courts. And they present much greater potential for finality to be hindered.

Under the Fourth Circuit's interpretation of Section 2244(d)(1)(A), a person who had a valid basis for seeking an out-of-time appeal in Texas, even one that lacked any arguable claim to address on appeal, would not face any AEDPA time limitation for filing a federal writ petition pursing his substantive trial claims. There is no statute of limitations in Texas for filing a state habeas application. *See* Tex. Code Crim. Proc. art. 11.07. Under that construction, such a person could file the state writ application years after his conviction was final, and even years after discovering the facts supporting the entitlement to an out-of-time appeal, and not be time-barred when he subsequently filed a federal habeas application. The AEDPA clock would simply restart whenever the out-of-time appeal concluded or the time for seeking further review within the out-of-time appeal expired. The interest in finality would be undermined by creating a great potential for delay in the adjudication of federal claims. *See Duncan*, 533 U.S. at 180. This consequence is aptly demonstrated by the result in *Frasch*, where the petitioner delayed seeking an out-of-time appeal for almost ten years. *See Frasch*, 414 F.3d at 520-21.

It is also aptly demonstrated in this case, where Jimenez took over four years to file a state habeas application seeking an out-of-time appeal due to ineffective assistance of appellate counsel, even after the date he concedes he discovered the factual predicates of that claim in 1998. Jimenez also took no action to otherwise pursue the claims he eventually

raised in his federal petition for six years after his conviction was final. This, despite his allegation in the district court that he believed he had never gotten an appeal – although his trial attorney had told him that he might get another attorney appointed to him for that purpose. Petitioner's Response to Respondent's Answer, at 9.

Nor do the holdings of the Fourth and Tenth Circuits, focusing on the state's characterization of the out-of-time appeal proceeding and the nature of review, promote uniformity in the application of the AEDPA statute of limitations, which is what Jimenez purports to seek. For example, there appears to be no functional difference between the out-of-time appeal provided in Texas and that provided in Nebraska, except that Texas employs the legal fiction of turning back the clock and Nebraska does not. The nature of the review provided remains the same. Were state characterization paramount, the AEDPA's limitations statute would apply much more harshly to inmates in Nebraska who are able to demonstrate ineffective assistance to obtain an out-of-time appeal than to those in Texas. This disparity would not be based on any functional distinction in the states' laws. Nor would the leniency in Texas be based on promoting the goals of the AEDPA.

2. **These holdings have not found support; therefore the split in the Circuits is both narrow and shallow.**

Not only did the decision by the Fourth Circuit in *Frasch* not have the full support of the panel deciding it– nor have any of the cases citing to *Frasch* applied its holding– Jimenez has cited no decision from any other Circuit which follows the reasoning of the Fourth or Tenth Circuits. Jimenez did cite to *Bridges v. Johnson*, from the Eleventh Circuit, arguing that it follows the reasoning of the Fourth and Tenth Circuits, that the question of whether a procedure is "direct review" or a collateral proceeding is a question of State law. Pet. Cert. at 12. A reading of the case, however, demonstrates that it does not support Jimenez's

contention. In *Bridges* the Eleventh Circuit addresses not an out-of-time appeal, but a state procedure called "sentence review." *Bridges*, 284 F.3d at 1202. The court did look to state law, which distinguished "sentence review" from an appeal of right, to determine that the sentence-review process was not "direct review." However, it determined that the process was also not a collateral proceeding under Section 2244(d)(2) by reading Georgia Code provisions together with Supreme Court precedent regarding the goals of the AEDPA, focusing on exhaustion and finality. *Bridges*, 284 F.3d at 1203. *Bridges*, therefore, appears rather to support the Fifth Circuit's focus on how the procedure functions not only within the state law context, but within the context of promoting the goals of the AEDPA limitations provisions.

Thus, any conflict or split between the Circuits on this issue is very narrow and shallow, and does not warrant review by this Court at this time. There are only one or two Circuits that appear out of line with the rest. At most, the issue needs time to percolate as it has in the Sixth Circuit.

The Fifth Circuit's interpretation of Section 2244(d)(1)(A), applied by the district court in dismissing Jimenez's federal habeas petition as untimely, is the better interpretation and the predominant one. It is consistent with principles of statutory construction, it promotes the interest of finality of state court judgments, requires due diligence in seeking relief, and prevents state courts or petitioners from lengthening the federal limitations period.

Jimenez's petition was appropriately dismissed as barred by the AEDPA statute of limitations. There is no compelling reason for this Court to exercise its discretion to review this case.

II. The Supreme Court need not grant certiorari review on the issue of equitable tolling because Jimenez's case presented neither rare and exceptional circumstances nor diligence and therefore the Fifth Circuit's denial of COA is not in conflict with any other Circuit or this Court.

Jimenez has not demonstrated a need for this Court to exercise certiorari review to determine whether the Fifth Circuit should have issued a certificate of appealability regarding the district court's denial of equitable tolling. The Fifth Circuit's decision does not conflict with decisions from this Court or other Circuit Courts. And Jimenez has not presented any authority to demonstrate that reasonable minds could differ on the issue. Nor do the circumstances of Jimenez's case present the issue of equitable tolling in a context such that it should be settled by this Court in this case. Therefore, this Court should deny certiorari review.

Even assuming *arguendo* that equitable tolling is available for prisoners who file Section 2254 petitions,[13] the Fifth Circuit did not err in finding that reasonable jurists would not find it debateable whether the district court was correct in its procedural ruling denying Jimenez equitable tolling because no rare and exceptional circumstances exist to warrant such tolling in this case. Nor was Jimenez diligent in pursuing his claims. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he

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[13] This Court has not decided whether equitable tolling applies to federal habeas petitions. *See Lawrence v. Florida*, __U.S.__, 127 S. Ct. 1079, 1087 (2007). However, a post-*Lawrence* decision indicates that equitable tolling would likely not apply. In *Bowles v. Russell*, this Court recently found that statutory time limits created by Congress are not subject to equitable exceptions. __U.S.__, 127 S. Ct. 2360, 2366 (June 14, 2007). The time limits created in 28 U.S.C. § 2244(d) are statutory and were created by Congress. Consequently, although the Director did not argue this in the courts below, based on this new precedent, the Director contends that equitable tolling is not applicable to time-barred federal habeas petitions.

has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

In applying the general principle of equitable tolling to habeas petitioners under Section 2254, the Fifth Circuit has explained, "[t]he doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir.1998). It is a discretionary doctrine "that turns on the facts and circumstances of [each] particular case, . . . and does not lend itself to bright-line rules." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). "Equitable tolling applies principally when the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir.1999). Specifically, the Fifth Circuit has held that indigence, incarceration, *pro se* status, limited education, lack of legal training or ignorance of the law or filing deadlines, lack of access to federal statutes and case law, illiteracy, and deafness, are insufficient to justify equitably tolling the limitations period. *Felder v. Johnson*, 204 F.3d 168, 171-72 (5th Cir. 2000); *Turner v. Johnson*, 177 F.3d 390, 391 (5th Cir. 1999); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999).

Jimenez alleges that he is entitled to equitable tolling because he was deprived of his first appeal due to ineffective assistance of appellate counsel. But he has not demonstrated that reasonable jurists would find it debateable whether he were entitled to equitable tolling for his counsel's failure to inform him of the status of his appeal. The Fifth Circuit has found that although the defendant is entitled to effective assistance of counsel on direct appeal, violation of that right is not relevant to and does not toll the AEDPA limitations period. *See Molo v. Johnson*, 207 F.3d 773, 776 (5th Cir. 2000). Nor does the fact that a state court

granted an out-of-time appeal on a claim of ineffective appellate counsel entitle a petitioner to equitable tolling. *See Salinas*, 354 F.3d at 431-32.

Jimenez also alleged he is entitled to equitable tolling because he is indigent, incarcerated, Hispanic, and proceeding *pro se*. *Jimenez v. Quarterman*, slip op. at 8; Pet. Cert. at 18-21. Given the Fifth Circuit precedent outlined above, Jimenez has failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling denying Jimenez the discretionary equitable tolling he requested.

Additionally, Jimenez's argument that he is entitled to equitable tolling regarding his appellate counsel's ineffective assistance would not relate to his claims regarding his guilty plea or the court's order placing him on deferred-adjudication probation. His appeal after the revocation of such probation, and any delay in discovering that such appeal had been dismissed, is irrelevant to his pursuit of relief regarding his claims pertaining to his plea and the order, because such claims could not properly be raised in the appeal from his revocation. *See* Tex. R. App. P. 41(b)(1)(1990), now Tex. R. App. P. 26.2(a)(1)(stating that a defendant convicted in Texas must file his notice of appeal within 30 days after the trial court imposes or suspends the sentence in open court); *see also Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999) (holding that a defendant placed on deferred adjudication community supervision must raise issues relating to the original plea proceeding in an appeal taken when the community supervision is first imposed and not after subsequent revocation proceedings). Again, Jimenez's ignorance of this legal fact would not justify equitable tolling. *See Turner*, 177 F.3d at 391. Therefore, with respect to these claims, his limitations period expired at the end of the grace period on April, 24, 1997. *See Felder*, 204 F.3d at 169. Additionally,

Jimenez has conceded that these claims are meritless even if not time-barred. *See* Pet. Cert. at 14; Petitioner's Petition for Certificate of Appealability in the Fifth Circuit, at 4.

Regarding the remainder of his claims, although Jimenez contends that he was misled not only by counsel, but by the court of appeals's response to his inquiry regarding the status of his appeal, he has not established that the miscommunication prevented him in some extraordinary way from timely asserting his rights. *See Coleman v. Johnson*, 184 F.3d at 402. But even assuming, *arguendo*, that Jimenez were entitled to equitable tolling until 1998, when it appears he claims he was first able to discover, through the exercise of due diligence, that his appeal had been dismissed,[14] his petition would still be untimely. Jimenez would not be entitled to equitable tolling for the approximately four years that passed after he concedes he was able to discover the ineffectiveness of his initial appellate counsel and that his appeal had been dismissed. During those four years Jimenez filed neither state habeas nor federal habeas applications, much less applications pursuing relief for the claims he now raises in federal habeas.

Between 1998 and 2002, Jimenez claims his delay was not due to lack of diligence, but to his indigency, lack of education, difficulty in finding someone to help him, transfers of inmates and institutional policies regarding inmate communication, the fact that English is his second language, and thinking his federal limitations period had already expired. Pet.

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[14] Such tolling would not be statutory under Section 2244(d)(1)(D) because the factual predicate he claims he discovered at that time relates only to his claim of ineffective assistance of appellate counsel, for which he obtained state habeas relief in the form of an out-of-time appeal. It is not the factual predicate for any of the claims he raised in his federal habeas petition. Fed. Writ Pet. at 7-8. To the extent he presents different or additional factual allegations to this Court, they are not properly before the Court. *Vernado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (factual allegations may not be raised for the first time on appeal).

Cert. at 18-21.[15] His explanations for the delay, however, present nothing more than circumstances common to the inmate experience which Congress is presumed to have taken into consideration when passing the one-year limitation statute. Moreover, Jimenez concedes that he decided to take his time in preparing his state habeas application at least in part because he believed his federal limitations period had expired and he was not certain he would be able to file a federal habeas petition. Pet. Cert. at 20. Once again, to the extent, if any, that Jimenez was incorrect in this belief, his ignorance of the law would not justify equitable tolling. *See Turner*, 177 F.3d at 391. His alleged circumstances were neither rare nor exceptional circumstances for incarcerated inmates.

However, even assuming, *arguendo*, that Jimenez were entitled to equitable tolling up to the date he filed his first state habeas application on April 11, 2002, his federal petition would still be untimely. Four-hundred and twenty-five days elapsed between the refusal of his PDR in his out-of-time appeal and the filing of his second state habeas application. Jimenez provides no argument for equitable tolling during the year and approximately two months that he waited after his PDR was refused in his out-of-time appeal before he filed his second state habeas application. To the extent he argues that this period should be equitably tolled because he believed it would be statutorily tolled for ninety days after the PDR was

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[15] Jimenez's allegations presented in support of his argument for equitable tolling in his petition for certiorari review differ somewhat from the allegations he presented in support of his argument in the district court. One example of these discrepancies is that in the district court he argued that the inmate helping him with his state writ application was transferred off the unit *after* Jimenez was granted the out-of-time appeal. Petitioner's Response to Respondent's Answer at 10. In his petition for certiorari, he contends that same inmate was transferred to a different unit some time during the four years he claims he was diligently preparing his first state habeas application. Cert. Pet. at 20-21. In the district court, he also claimed that he believed that he did not have an appeal pending. Petitioner's Response to Respondent's Answer at 9-10.

refused, once again, his ignorance of the law does not invoke equity. *See Turner*, 177 F.3d at 391. Nor does the fact that those ninety days are not counted towards his one-year limitations period under Section 2244(d)(1)(A), but are under Section 2244(d)(2), entitle him to equitable tolling of that time. This too is a circumstance of which Congress is presumed to have been aware when it passed the AEDPA limitations provisions. Because the limitations period expired one year from the Court of Criminal Appeal's denial of his PDR, his second state habeas application, filed over two months after that expiration, would not statutorily toll his limitations period under Section 2244(d)(2) and his federal petition would have been filed 285 days past the latest possible equitable expiration of his limitations period, or 650 days after his PDR on out-of-time appeal had been refused.

The district court, in addition to finding no extraordinary circumstances, also found that Jimenez, despite his conclusory allegations to the contrary, had not been diligent in pursuing his claims. *Jimenez v. Quarterman*, slip op. at 10-11. Because his equitable tolling claim is without any arguable merit, Jimenez has failed to show not only that the Fifth Circuit should have found the issue debateable, but that the circumstances of his case provide any compelling reason for this Court to grant certiorari on this issue. Therefore, certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Jimenez's petition for writ of certiorari should be denied.

Respectfully submitted,

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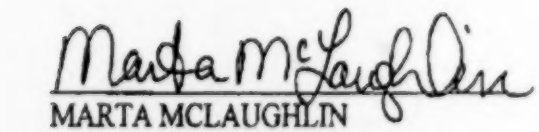

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ATTORNEYS FOR RESPONDENT

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CARLOS JIMENEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	6:05-CV-052-C
NATHANIEL QUARTERMAN,[1] Director,	)	
Texas Department of Criminal Justice,	)	
Correctional Institutions Division,	)	
	)	ECF
Respondent.	)	

ORDER

Petitioner Carlos Jimenez, acting *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on July 22, 2005. Respondent filed an Answer with Brief in Support on October 3, 2005, and provided copies of Petitioner's relevant state court records. Petitioner subsequently filed his objections and response on December 5, 2005.

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 119th Judicial District Court of Tom Green County, Texas, in cause number CR91-0528-B, styled *The State of Texas v. Carlos Jimenez*. In that cause number, Petitioner was charged with the felony offense of burglary of a habitation, and one prior felony conviction for aggravated assault with a deadly weapon was alleged to enhance the sentence. Pursuant to a plea agreement, Petitioner pleaded guilty to the charge and true to the enhancement paragraph; and on November 12, 1991, the trial court deferred adjudication and placed him on probation for five years. On December 3, 1991, the trial court entered an Amended Judgment to add the monthly probation fee that had been announced in open court at the sentencing. Petitioner did not appeal.

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[1]Nathaniel Quarterman has been named Director of the Texas Department of Criminal Justice, Correctional Institutions Division, and the caption is being changed pursuant to Fed. R. Civ. P. 25(d).

On March 3, 1995, the prosecution filed a Motion to Revoke Deferred Adjudication, Probation, and to Proceed to Adjudicate Guilt, which alleged that he had violated three terms and conditions of his deferred adjudication probation. A State's First Amended Motion to Revoke Deferred Adjudication, Probation, and to Proceed to Adjudicate Guilt, which alleged four violations of the terms and conditions of probation, was filed on October 3, 1995. Following a hearing on the motion to revoke on November 6, 1995, the trial court found that Petitioner had violated all four terms and conditions of his probation as alleged in the First Amended Motion to Revoke, adjudicated guilt, and sentenced him to forty-three (43) years' incarceration in the Texas Department of Criminal Justice. A Motion for New Trial was filed on December 4, 1995, and the trial court appointed counsel to represent Petitioner on appeal on December 8, 1995. The appointed counsel filed a Notice of Appeal on January 24, 1996. On July 15, 1996, appellate counsel filed an *Anders*[2] brief in the Third Court of Appeals and alleged that, in his professional opinion and after a diligent review of the record, Petitioner had no grounds for an appeal. In a *per curiam* unpublished opinion filed on September 11, 1996, the Third Court of Appeals held that Petitioner's appellate brief was frivolous because the notice did not raise the question of jurisdiction and dismissed the appeal (No. 03-96-00123-CR). Petitioner did not file a petition for discretionary review.

On April 11, 2002, Petitioner filed a state habeas application and argued that he had been denied the right to file an appeal because his attorney had not properly notified him that he was filing

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[2]In *Anders v. California*, 386 U.S. 738 (1967), the Supreme Court of the United States determined that "when [appellate] counsel finds a case to be wholly frivolous, after conscientious examination of it, he should so advise the court and request permission to withdraw." *Id.* at 744. The Court further noted that such request must be accompanied by a brief that refers to anything that might arguably support an appeal and a copy of the brief should be provided to the indigent defendant "and time allowed him to raise any points that he chooses . . . ." *Id.* Thus, an "*Anders* brief" refers to the request to withdraw and accompanying brief that sets out anything that might arguably support an appeal.

an *Anders* brief. In an opinion delivered on September 25, 2002, the Texas Court of Criminal Appeals granted Petitioner permission to file an out-of-time appeal (App. No. 53, 212-01).

On October 25, 2002, Petitioner filed a notice of appeal pursuant to the order granting him permission to file an out-of-time appeal.[3] In an unpublished Memorandum Opinion filed May 15, 1993, the Third Court of Appeals affirmed Petitioner's conviction and sentence (No. 03-02-00733-CR). Although Petitioner filed a *pro se* petition for discretionary review, the Texas Court of Criminal Appeals refused the petition on October 8, 2003.

Petitioner filed a second state application for writ of habeas corpus on December 6, 2004. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on June 29, 2005 (App. No. 53-212-02).

Because Petitioner declared under penalty of perjury that he delivered the instant petition to prison officials for mailing to the court on July 19, 2005, the petition is deemed to be filed as of July 19, 2005. *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (holding that for purposes of determining the applicability of the AEDPA, a federal petition is considered filed on the date it is delivered to prison officials for mailing to the district court).

The Court understands Petitioner to raise the following grounds for review in the instant petition:

(1) He was denied due process at the hearing on the motion to adjudicate and revoke his probation because the judge was biased and had pre-determined his sentence.

(2) He was denied due process because the sentencing judge threatened him with perjury, called him a liar, interrupted Petitioner, denied Petitioner the right to explain why he did not

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[3]Petitioner's appointed attorney also filed an *Anders* brief in the out-of-time appeal and alleged that he could find no grounds for an appeal and any appeal was frivolous and meritless.

understand his previous plea of guilty, and refused to consider the fifteen-year sentencing agreement between Petitioner and the prosecutor.

(3) His conviction was unlawfully obtained because his plea of guilty was coerced, involuntary, and unintelligent.

(4) He was denied effective assistance of counsel at the plea proceeding because counsel failed to adequately explain deferred adjudication or the use of a prior conviction as a sentencing enhancement.

(5) He was denied effective assistance of counsel at the revocation proceeding because counsel did not advise the court that Petitioner had agreed to a fifteen-year sentence, counsel failed to object to the sentencing judge's bias, prejudice, and vindictiveness, counsel was intimidated by the sentencing judge, and he failed to explain to Petitioner that he had to plead true to all allegations in the motion to adjudicate to be eligible to receive a fifteen-year sentence.

Respondent argues that Petitioner has failed to timely file his § 2254 petition.

STATUTE OF LIMITATIONS

Petitioner filed his federal petition after April 24, 1996; therefore, his petition is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA, signed into law on April 24, 1996, enacted the present 28 U.S.C. § 2244(d), which establishes a one-year limitation on filing federal habeas corpus petitions. Sub-section (d) now provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of --
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United

> States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Under the statute, the habeas clock begins to run when one of the circumstances included in § 2244(d)(1)(A)-(D) triggers the Act's application.

Petitioner first argues that his petition is not time-barred because the statute of limitations did not begin to run in his case under 28 U.S.C. § 2244(d)(1)(A) until January 8, 2004, because the out-of-time appeal "reset" the one-year period; the conclusion of his "direct appeal" included the periods for filing a petition for discretionary review and a petition for writ of certiorari; and his state habeas applications tolled the limitations period. He does not argue that the one-year limitations period was triggered by the circumstances listed in Sections 2244(d)(1)(B), (C), or (D). Respondent agrees that the applicable section is § 2244(d)(1)(A) but disagrees with Petitioner's tolling arguments and contends that the instant petition is time-barred.

Petitioner raises claims relating both to (1) his initial plea of guilty and deferred adjudication community supervision sentence and (2) the revocation of his deferred adjudication community supervision. Even though Petitioner does not distinguish between the two groups of claims in his limitations argument, this Court will analyze each group separately because each group of claims

became "final" for purposes of the AEDPA's limitations period on different dates. *See Dones v. Dretke*, No. 3:05-CV-2237-M, 2006 WL 1294077, at *2 (N.D. Tex. May 11, 2006) (separating claims challenging an order deferring adjudication and imposing community supervision from a claim challenging an order revoking community supervision and imposing a prison sentence for purposes of calculating the one-year limitations period).

1. Claims Regarding Petitioner's Plea of Guilty and Placement on Deferred Adjudication Community Supervision

On November 12, 1991, Petitioner pleaded guilty and the trial court deferred adjudication and entered an order for five years of community supervision. The trial court entered an Amended Judgment on December 3, 1991. Petitioner did not file an appeal.

Under Section 2244(d)(1)(A), the AEDPA's one-year limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003). The one-year period begins to run under § 2244(d)(1)(A) when the judgment of conviction becomes final, "not when the petitioner becomes aware that the judgment is final." *Crutcher v. Cockrell*, 301 F.3d 656, 657 (5th Cir. 2002). Furthermore, the "AEDPA, not state law, determines when a judgment is final for federal habeas purposes." *Foreman v. Dretke*, 383 F.3d 336, 339 (5th Cir. 2004) (citing *Roberts v. Cockrell*, 319 F.3d at 694).

"Although an order of deferred adjudication is not a judgment under Texas law, it is a judgment under the relevant federal law." *Caldwell v. Dretke*, 429 F.3d 521, 527 (5th Cir. 2005), *cert. denied, Caldwell v. Quarterman*, (No. 05-10671) 549 U.S. ____ (October 10, 2006). "Because an order of deferred adjudication community supervision is a final judgment within the plain meaning of AEDPA section 2254, the one-year statute of limitations, for challenging substantive issues of the

orders of deferred adjudication, beg[ins] to run when the order deferring adjudication bec[omes] final." *Id.* Petitioner did not file an appeal following his plea of guilty; therefore, his conviction became final by expiration of the time for filing a direct appeal from the order deferring adjudication on December 12, 1991. Tex. R. App. P. 41(b)(1) (1990), now Tex. R. App. P. 26.2(a)(1) (stating that a defendant convicted in Texas must file his notice of appeal within 30 days after the trial court imposes or suspends the sentence in open court). *See Scott v. Johnson*, 227 F.3d 260, 262 (5th Cir. 2000) (holding that when a Texas petitioner does not appeal his conviction, it becomes final thirty days after his plea of guilty); *Roberts v. Cockrell*, 319 F.3d at 694 ("If the defendant stops the appeal process before [filing a petition for writ of certiorari], the conviction becomes final when the time for seeking further direct review in the state court expires."). *See also Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999) (holding that a defendant placed on deferred adjudication community supervision must raise issues relating to the original plea proceeding in an appeal taken when the community supervision is first imposed and not after subsequent revocation proceedings). Hence, Petitioner's plea of guilty and five-year sentence to deferred adjudication community supervision became final for purposes of the AEDPA's limitations period on December 12, 1992, and the one- year limitations period literally expired on December 12, 1993.

Nevertheless, for federal petitions filed after the enactment of the AEDPA on April 24, 1996, which attack convictions that became final thereto, the United States Court of Appeals for the Fifth Circuit has determined that an inmate must be accorded a one-year "grace period" within which to file his federal petition; that is, the petitioner must file his federal petition on or before April 24, 1997. *Felder v. Johnson*, 204 F.3d 168, 169 (5th Cir. 2000). Petitioner, however, did not file his petition until July 19, 2005, over eight years after the applicable limitations period had expired. Therefore,

unless Petitioner demonstrates that he is entitled to statutory or equitable tolling of the limitations period, his claims regarding the original guilty plea and order for deferred adjudication community supervision are time-barred.

Section 2244(d)(2) provides for tolling of the limitation period during the time when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. "Congress meant to include within the scope of § 2244(d)(2) those 'properly filed' applications, without respect to state nomenclature or the nature of the petitioner's state confinement, that, pursuant to the wording of § 2244(d)(2), seek 'review' of the 'pertinent judgment or claim.'" *Moore v. Cain*, 298 F.3d 361, 366-67 (5th Cir. 2002). "[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (emphasis in original).

Although Petitioner properly filed two state habeas applications, on April 11, 2002, and December 6, 2004, he is not entitled to tolling under 28 U.S.C. § 2244(d)(2) because neither application was filed before the limitations period expired on April 24, 1997. *See Scott v. Johnson*, 227 F.3d at 263 (holding that a state application filed after the one-year limitation period had expired did not toll the limitation period under § 2244(d)(2)).

Petitioner also argues that he is entitled to equitable tolling of the limitations period because the limitations period is not a jurisdictional bar, he was deprived of his first appeal because of ineffective assistance of counsel, and he is indigent, incarcerated, Hispanic, and proceeding *pro se*. Equitable tolling is a discretionary doctrine "that turns on the facts and circumstances of [each] particular case, . . . and does not lend itself to bright-line rules." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). "The doctrine . . . is applied restrictively and . . . is entertained only in cases

presenting 'rare and exceptional circumstances where it is necessary to preserve a plaintiff's claims when strict application of the statute of limitations would be inequitable.'" *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (quoting *Fierro v. Cockrell*, 294 F.3d 674, 682 (5th Cir. 2002) (internal quotation and alteration omitted)). The doctrine applies principally "where the [petitioner] is actively misled by the [respondent] about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (internal quotation marks omitted) (emphasis added). *See In re Wilson*, 442 F.3d at 875 ("A petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify."). The doctrine does not apply "where a petitioner has failed to pursue habeas relief diligently." *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002). Therefore, a court must examine each case on its individual facts and, guided by precedent, "determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling." *Fisher v. Johnson*, 174 F.3d at 713 (footnote omitted).

Attorney error or neglect is insufficient to warrant equitable tolling. *Cousin v. Lensing*, 310 F.3d at 849. *See United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) ("Ineffective assistance of counsel does not constitute a basis for equitable tolling."); *Moore v. Cockrell*, 313 F.3d 880 (5th Cir. 2002) (holding that counsel's delay in notifying petitioner of the result of a direct appeal does not constitute a basis for equitable tolling); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002) (holding that "counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [petitioner's] habeas petition in the district court within the one-year limitations period"); and *Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (holding that "ineffective assistance

on direct appeal in state court is not relevant to the question of tolling the AEDPA's statute of limitations").

Petitioner's allegations of indigence, incarceration, *pro se* status, and limited education are likewise insufficient to justify equitably tolling the limitations period. *See Turner v. Johnson*, 177 F.3d at 391 (providing that unfamiliarity with legal process, ignorance of the law, or lack of legal training does not merit equitable tolling); *Felder v. Johnson*, 204 F.3d at 171-72 (finding that ignorance of the law, lack of knowledge of filing deadlines, a prisoner's *pro se* status, lack of access to federal statutes and case law, incarceration prior to enactment of the AEDPA, illiteracy, deafness, a lack of legal training, and actual innocence claims will not support equitable tolling of the AEDPA's statute of limitations).

Moreover, the doctrine of equitable tolling "will not be applied where the [petitioner] failed to diligently pursue habeas corpus relief under § 2254." *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). Petitioner has provided no evidence that he was prevented by the State of Texas from timely raising his claims or that any "rare and exceptional" circumstances warrant equitable tolling of his claims from April 24, 1997, when the one-year period expired, until July 19, 2005, when he is deemed to have filed his petition. *See Phillips v. Donnelly*, 216 F.3d at 511 (holding that the burden of proving facts to support a claim of equitable tolling lies with the party seeking equitable tolling).

Accordingly, Petitioner's claims regarding his plea of guilty and the imposition of five years' deferred adjudication community supervision are time-barred under 28 U.S.C. § 2254(d)(1)(A).[4]

---

[4]To the extent that Petitioner argues that he could not appeal from his plea of guilty and the imposition of five years' deferred adjudication community supervision in 1991 until after his community supervision was revoked and sentence imposed in 1995, his claims are still time-barred as discussed in the following section. *See Manuel v. State*, 994 S.W.2d at 661-62 (noting in 1999 that prior to 1987, when Texas Code of Criminal Procedure Art. 44.01(j) was enacted, a defendant placed on deferred adjudication community supervision could challenge the decision to defer adjudication or its terms and conditions only

2. *Claims Regarding the Revocation of Deferred Adjudication Community Supervision*

On November 6, 1995, the trial court held a hearing, adjudicated guilt, and sentenced Petitioner to 43 years' incarceration. Counsel for Petitioner filed a motion for new trial and notice of appeal. The Third Court of Appeals dismissed the appeal for want of jurisdiction on September 11, 1996, and Petitioner did not file a petition for discretionary review. Petitioner's claims regarding the revocation of his community supervision and 43-year sentence therefore became final on October 11, 1996, when his time for filing a petition for discretionary review expired, and he had to file his federal petition on or before October 11, 1997.

Petitioner, however, argues that because he was granted permission to file an out-of-time appeal pursuant to his first state writ application, his conviction became final for limitations purposes at the conclusion of the out-of-time appeal process, that is, on January 6, 2004, when his time expired for filing a petition for writ of certiorari.[5] Although he argues that the decision by the Fourth Circuit Court of Appeals in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005), supports his argument, he has

---

by moving for final adjudication and then appealing the adjudication, but the 1987 change in the law required a defendant placed on deferred adjudication community supervision to raise issues relating to the original plea proceeding only in an appeal taken when the deferred adjudication community supervision was first imposed).

[5]Following the revocation of his deferred adjudication community supervision and sentencing to 43 years' incarceration, Petitioner's appointed counsel filed a notice of appeal and subsequently an *Anders* brief. The Third Court of Appeals dismissed the appeal on September 11, 1996, and Petitioner did not file a petition for discretionary review. Five years later, on April 11, 2002, Petitioner filed a state application for writ of habeas corpus and alleged that he had been denied the right to appeal because his counsel had not properly notified him that he was filing an *Anders* brief so Petitioner could file his own *pro se* brief. On September 25, 2002, the Texas Court of Criminal Appeals granted Petitioner permission to file an out-of-time appeal. Petitioner contends that this granting of an out-of-time appeal "restored" him to the position he was originally in immediately after the revocation of his deferred adjudication community supervision on November 6, 1995. He then argues that his revocation actually became final for purposes of the AEDPA's limitations period on January 6, 2004, when his time expired for filing a petition for writ of certiorari following the out-of-time appeal. Petitioner also argues that because he filed his second state application on December 6, 2004, the limitations period was tolled until it was denied on June 29, 2005, and his federal petition was therefore timely filed on July 19, 2005.

overlooked the decision by the Fifth Circuit Court of Appeals in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004),[6] which is binding on this Court.

In *Salinas*, the Fifth Circuit determined that "[o]n its face, AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between." *Id.* at 429. "As a result, when a petitioner convicted in the Texas system acquires the right to file an 'out-of-time' PDR, the relief tolls the AEDPA's statute of limitations until the date on which the Court of Criminal Appeals declines to grant further relief, but it does not require a federal court to restart the running of AEDPA's limitations period altogether." *Id.* at 430 (footnote omitted). Thus, "if . . . an 'out-of-time' PDR is awarded only as a result of the collateral review process, limitations is tolled merely while the petitioner seeks to obtain that relief." *Id.* at 430. Although the decision in *Salinas* involved an out-of-time petition for discretionary review, its holding is equally applicable to an out-of-time appeal that "is necessarily the product of state habeas review . . . ." *Id.* at 431. *See Roach v. Quarterman*, No. 3:05-CV-2539-P, 2006 WL 2586087 at *2 n.5 (N.D. Tex. Sept. 8, 2006) (noting that the decision in *Salinas* is equally applicable to cases involving out-of-time PDRs or direct appeals obtained by state collateral review). Thus, for purposes of the AEDPA's statute of limitations, the revocation of Petitioner's deferred adjudication community supervision became final on October 11, 1996, when his time for seeking direct review expired, and the granting of permission to file an out-of-time appeal did not "restart" the limitations period. The

[6]In *Frasch v. Peguese*, 414 F.3d 518, 522-23 (4th Cir. 2005), the Fourth Circuit Court of Appeals rejected the Fifth Circuit's approach in *Salinas* because "it ignore[d] that two separate proceedings [were] involved"; that is, even though Frasch obtained the right to file an out-of-time appeal in a collateral proceeding, that proceeding ended with the order granting him leave to file the out-of-time appeal, which placed him in the same procedural posture as if he had timely filed his direct appeal.

one-year limitations period expired on October 11, 1997, and the instant petition is clearly time-barred unless Petitioner demonstrates that he is entitled to statutory or equitable tolling.

Petitioner is not entitled to statutory tolling under § 2244(d)(2) because he filed both of his state habeas applications after the one-year limitations period expired. *Scott v. Johnson*, 227 F.3d at 263.

Petitioner is not entitled to tolling for the time period during which his first state habeas application and the resulting out-of-time appeal were pending because neither was filed before the one-year limitations period expired. *See Miles v. Dretke*, No. 3:03-CV-2725-K, 2004 WL 1041635 (N.D. Tex. May 5, 2004) (adopting the findings and conclusions of the magistrate judge, 2004 WL 827941 at *3 (N.D. Tex. April 15, 2004)) (finding that when the state habeas application that seeks permission to file an out-of-time PDR is filed after the one-year limitation period has expired, neither the state habeas application nor the out-of-time PDR will toll the limitation period). *See also Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) ("A state court's subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application.").

As previously discussed, Petitioner's claims of indigency, incarceration, *pro se* status, limited education, and limited ability to speak English are insufficient to warrant equitable tolling. Moreover, he has not demonstrated that he diligently pursued relief in either state or federal court. *Melancon v. Kaylo*, 259 F.3d at 408. Petitioner was originally placed on deferred adjudication community supervision on November 12, 1991, and his community supervision was revoked on November 6, 1995, but he did not file his first state habeas application until April 11, 2002, over six years later. Furthermore, after Petitioner's discretionary review was refused on October 8, 2003, following his

out-of-time appeal, he did not file another state habeas application until December 6, 2004, over one year later. *See Coleman v. Johnson,* 184 F.3d at 403 (holding that a petitioner was not entitled to equitable tolling where he did not explain the six-month delay between receiving notice of the denial of his state appeal and filing his federal petition). Petitioner has provided no explanation for these lengthy delays and none is apparent from the record. "Equity is not intended for those who sleep on their rights." quoting *Fisher v. Johnson,* 174 F.3d 710, 715 (5th Cir. 1999).

CONCLUSION

Accordingly, the Court finds that the above-styled and -numbered case should be DISMISSED with prejudice pursuant to 28 U.S.C. § 2244(d)(1). All relief not expressly granted is denied and any pending motions are hereby denied.

SO ORDERED.

Dated October 23, 2006.

SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

No. 07-6984

IN THE
SUPREME COURT OF THE UNITED STATES

RECEIVED
FEB 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CARLOS JIMENEZ,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 6th day of February, 2008, one copy of **Respondent's Brief in Opposition** was mailed to Carlos Jimenez, TDCJ-CID# 745196, Telford Unit, P.O. Box 9200, New Boston, Texas 75570-9200. All parties required to be served have been served. I am a member of the Bar of this Court.

GRETCHEN B. MERENDA
Assistant Attorney General
Postconviction Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400

ATTORNEY FOR RESPONDENT

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2008

Honorable William K. Suter, Clerk
United States Supreme Court
Office of the Clerk
1 First St., N.E.
Washington, D.C. 20543

SENT VIA OVERNIGHT MAIL

Re: *Carlos Jimenez v. Nathaniel Quarterman,* No. 07-6984

Dear Mr. Suter:

Enclosed please the original and nine copies of Respondent's Brief in Opposition to be filed among the papers in the above-referenced cause. Also enclosed is the Proof of Service form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid envelope.

By copy of this letter, I am forwarding one copy to the petitioner. Thank you for your kind assistance in this matter.

RECEIVED
FEB 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Sincerely,

Marta McLaughlin

MARTA McLAUGHLIN
Assistant Attorney General
Postconviction Litigation Division
(512) 936-1400

MM/br
Encls.
c: Carlos Jimenez
TDCJ-CID# 745196
Telford Unit
P.O. Box 9200
New Boston, Texas 75570-9200

T.P.

Supreme Court, U.S.
FILED
AUG 21 2007
OFFICE OF THE CLERK

07 6984

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS JIMENEZ — PETITIONER
(Your Name)

VS.

NATHANIEL QUARTERMAN — RESPONDENT(S)
DIR. TDCJ-CID.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States District Court for the Northern District of Texas at San Angelo Division
United States Court of Appeals for the Fifth Circuit at New Orleans, L.A.

[ ] Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Carlos Jimenez
(Signature)

RECEIVED
OCT 10 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Carlos Jimenez, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 8.00	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify):	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 8.00	$ 0	$ 0	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None			$
			$
			$

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of account	Amount you have	Amount your spouse has
TDCJ-CID	Inmate Trust	$ 0	$ None
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value None

☐ Other real estate
Value None

☐ Motor Vehicle #1
Year, make & model
Value None

☐ Motor Vehicle #2
Year, make & model
Value None

☐ Other assets
Description
Value None

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
None		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ NA	$ NA
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ NA	$ NA
Home maintenance (repairs and upkeep)	$	$
Food	$ NA	$ NA
Clothing	$ NA	$ NA
Laundry and dry-cleaning	$ NA	$ NA
Medical and dental expenses	$ NA	$ NA

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am incarcerated, indigent, and acting in pro se. I have no means of obtaining security or funds to pay the costs of the proceedings in this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 21, 20 07

Carlos Jimenez
(Signature)

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other: 0	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): 0	$ 0	$ 0
Installment payments		
Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: 0	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): 0	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

JOINT APPENDIX

Supreme Court, U.S.
FILED
JUN 17 2008
OFFICE OF THE CLERK

No. 07-6984

IN THE

Supreme Court of the United States

CARLOS JIMENEZ,

Petitioner,

v.

NATHANIEL QUARTERMAN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 24, 2007
CERTIORARI GRANTED MARCH 17, 2008

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APPENDIX A

U.S. District Court
U.S. District Court for the Northern District of Texas
San Angelo Division
CIVIL DOCKET FOR CASE #: 6:05-CV-00052

Case title: Carlos Jimenez v. Nathaniel Quarterman

Date Filed: 07/22/2005
Date Terminated: 10/23/2006

Assigned to: Judge Sam R. Cummings
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Appeals case court number:
06-11240 Fifth Circuit Court of Appeals

Petitioner

Carlos Jimenez	Represented by: Carlos Jimenez TDCJ No 745196 TDCJ Telford Unit PO Box 9200 New Boston, TX 75570-9200 PRO SE

Respondent

Douglas Dretke, Director TDCJ- CID	Represented by: Gretchen B Merenda Office of the Texas Attorney

Terminated:
07/21/2006

General
Postconviction Litigation Div
PO Box 12548
Austin, TX 78711-2548
512/936-1400
Fax: 512/936-1280
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent
Nathaniel Quarterman, Director TDCJ-CID

Represented by:
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	**#**	**Docket Text**
7/22/2005	1	MOTION for Leave to Proceed in forma pauperis (blr) (Entered: 07/26/2005)
7/22/2005	2	PETITION for Writ of Habeas Corpus filed by Carlos Jimenez. (blr) (Entered: 07/26/2005)
07/28/2005	3	ORDER granting 1 Motion for Leave to Proceed in forma pauperis. (blr) (Entered: 07/28/2005)
10/03/2005	9	ANSWER WITH BRIEF IN SUPPORT to Petition for Writ of Habeas Corpus by Douglas Dretke, Director TDCJ-CID.(mrr,

		) (Entered: 10/03/2005)
12/05/2005	15	RESPONSE in Opposition re 9 Response to Habeas Petition filed by Carlos Jimenez. (blr) (Entered: 12/29/2005)
10/23/2006	18	ORDER DISMISSING CASE - Court finds case should be dismissed w/prejudice (See order for specifics); All relief not expressly granted is denied and any pending motions are hereby denied. (Signed by Judge Sam R Cummings on 10/23/2006) (tmd) (Entered: 10/23/2006)
10/23/2006	19	JUDGMENT: For reasons stated in Court's Order of even date, Cause is dismissed w/prejudice. (Signed by Judge Sam R Cummings on 10/23/2006) (tmd) (Entered: 10/23/2006)
11/06/2006	20	NOTICE OF APPEAL as to 19 Judgment, 18 Order Dismissing Case by Carlos Jimenez. (tmd) Modified on 11/6/2006 (tmd). (Entered: 11/06/2006)
11/06/2006	21	MOTION for Leave to Proceed in forma pauperis with Certificate of Trust by Carlos Jimenez (tmd,) (Entered: 11/06/2006)
11/22/2006	24	CERTIFICATE AS TO APPEALABILITY AND ORDER:

		On 11/6/2006 Petitioner filed Notice of Appeal and Application to Proceed in Forma Pauperis. Court shall construe Petitioner's notice of appeal as request for certificate of appealability; Court finds that party appealing should be GRANTED leave to proceed in forma pauperis on appeal; A Certificate of Appealability should be DENIED. (Signed by Judge Sam R Cummings on 11/22/2006) (tmd) Modified on 11/22/2006 (tmd). (Entered: 11/22/2006)
05/31/2007	28	ORDER of USCA as to 20 Notice of Appeal filed by Carlos Jimenez. Appellant failed to demonstrate reasonable jurists would debate correctness of district court's conclusion that 2254 petition is time-barred; Accordingly, request for COA is DENIED. (tmd) (Entered: 05/31/2007)
03/26/2008	29	NOTICE from 5th Circuit advising Supreme Court has granted certiorari. (tmd) (Entered: 03/26/2008)
03/26/2008	30	Received letter from 5th Circuit Court of Appeals advising that Supreme Court had granted

		leave to proceed IFP and Petiton for Writ of Certiorari is granted as to Question 1 (only) of the petition for a writ of certiorari (Attachments: # 1 Letter/Notice from Supreme Court) (blr) (Entered: 03/27/2008)

APPENDIX B

General Docket
Fifth Circuit Court of Appeals

Court of Appeals Docket #:06-11240 **Docketed**:11/10/2006
Carlos Jimenez v. Nathaniel Quarterman **Termed**:05/31/2007
Appeal From: Northern District of Texas, San Angelo

Case Type Information: Habeas

Originating Court Information:
District: 0539-6 : 6:05-CV-52
Ordering Judge: Sam R Cummings, US District Judge
Date Filed: 07/22/2005
Date Order/Judgment: **/**/**
Date NOA Filed: 11/06/2006

Prior Cases:
None

Current Cases:
None

CARLOS JIMENEZ
Petitioner – Appellant

Carlos Jimenez
#745196
[NTC pse]
Texas Department of Criminal Justice
Institutional Division Telford Unit
Highway 98 S
PO Box 9200
New Boston, TX 75570-9200

v.

Nathaniel Quarterman Director, Texas Department of Criminal Justice, Correctional Institutions Division Respondent-Appellee	Gretchen Berumen Merenda, Assistant Attorney General FAX 512-936-1280 512-936-1400 [COR LD NTC gvt] Office of the Attorney General Postconviction Litigation Div 300 W 15th Street - 8th Floor William P Clements Building Austin, TX 78701

CARLOS JIMENEZ

Petitioner

v.

NATHANIEL QUARTERMAN

Respondent

11/10/2006	Prisoner case docketed without counsel. NOA filed by Appellant Carlos Jimenez. [06-11240] (jtr)
12/05/2006	District Court Order - COA denied. Date Denied: 11/22/06 [06-11240] Awaiting DC Action ddl satisfied. Motion for COA due on 1/16/07 for Carlos Jimenez. Brief in Support of COA due on 1/16/07 for Carlos Jimenez. (jtr)
12/05/2006	Record requested from district court. [06-11240] ROA due on 12/20/06. (jtr)

12/05/2006	Appearance form filed by Gretchen Berumen Merenda for Appellee Nathaniel Quarterman. [06-11240] (No. of forms filed: 1) (gmr)
12/11/2006	Record on appeal filed. Vol(s) of Electronic Pleadings: 1 Exhibit: 1 box (SCP). [06-11240] ROA ddl satisfied. (adb)
01/15/2007	Motion filed by Appellant Carlos Jimenez for certificate of appealability [5652707-1] Motion due ddl satisfied. Date of COS: 1/11/07 Sufficient [Y/N]: Y [06-11240] (jtr)
01/15/2007	Brief filed in support of motion for Certificate of Appealability [5652707-1] by Appellant Carlos Jimenez Brief in Support ddl satisfied. Excess pgs[Y/N]?: N Motion Requested[Y/N]? N [5652709-1] [06-11240] "Incorporated In Motion for COA" (jtr)
05/27/2007	COURT Order filed denying motion for Certificate of Appealability [5652707-1] Judge Initials: JES Copies to all counsel. [06-11240] (gmr)
10/17/2007	Supreme Court notice that petition for certiorari was filed on 08/24/07 by Appellant Carlos Jimenez. Supct No.: 07-6984 [06-11240] (cav)
03/26/2008	Supreme Court order received granting petition certiorari [5873157-1] by Appellant Carlos Jimenez on 03/17/08.

	[06-11240] (cav)
03/26/2008	**Record on appeal requested from the district court for the Supreme Court. [06-11240] (pok)**

APPENDIX C

TEXAS COURT OF APPEALS, THIRD DISTRICT AT AUSTIN

No. 03-96-00123-CR

Carlos Jimenez, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 119TH JUDICIAL DISTRICT NO. CR91-0528-B, HONORABLE JOHN E. SUTTON, JUDGE PRESIDING

PER CURIAM

Appellant pleaded guilty to an indictment accusing him of burglary of a habitation. Penal Code, 63d Leg., R.S., ch. 399, sec. 1, § 30.02, 1973 Tex. Gen. Laws 883, 926 (Tex. Penal Code Ann. § 30.02, since amended). The district court found that the evidence substantiated appellant's guilt and, pursuant to a plea bargain agreement, deferred further proceedings without adjudicating guilt and placed appellant on community supervision. The court later revoked supervision on the State's motion, adjudicated

appellant guilty, and assessed punishment, enhanced by a previous felony conviction, at imprisonment for forty-three years.

Appellant's court-appointed attorney filed a brief in which he concludes that the appeal is frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738 (1967), by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See also Penson v. Ohio*, 488 U.S. 75 (1988); *Gainous v. State*, 436 S.W.2d 137 (Tex. Crim. App. 1969); *Jackson v. State*, 485 S.W.2d 553 (Tex. Crim. App. 1972); *Currie v. State*, 516 S.W.2d 684 (Tex. Crim. App. 1974); *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978). A copy of counsel's brief was delivered to appellant, and appellant was advised of his right to examine the appellate record and to file a pro se brief. No pro se brief has been filed.

Appellant's notice of appeal does not preserve for review the district court's rulings on appellant's pretrial motions and does not state that the court gave appellant permission to appeal. As a result, we have jurisdiction in this cause only to consider jurisdictional issues. *Watson v. State*, 924 S.W.2d 711, 714-15 (Tex. Crim. App. 1996); Tex. R. App. P. 40(b)(1). Appellant's brief does not question the jurisdiction of the district court over either the subject matter of this cause or appellant personally. *Fairfield v. State*, 610 S.W.2d 771, 779 (Tex. Crim. App. 1981). In light of the frivolous appeal brief, we have examined the record and find no basis for challenging the district court's jurisdiction. Under the circumstances, we do not have jurisdiction of this appeal.

The appeal is dismissed.

Before Chief Justice Carroll, Justices Kidd and B. A. Smith
Dismissed for Want of Jurisdiction
Filed: September 11, 1996
Do Not Publish

APPENDIX D

No. CR-91-0528-B=WRIT # 1

EX PARTE CARLOS JIMENEZ IN THE 119TH DISTRICT
COURT OF TOM GREEN
COUNTY, TEXAS

ORDER OF TRIAL COURT RECOMMENDING GRANT OF OUT OF TIME APPEAL ON DEFENDANT'S APPLICATION NO. 1 FOR POST CONVICTION WRIT OF HABEAS CORPUS

A. RECORDS AND DOCUMENTS CONSIDERED UNDER JUDICIAL NOTICE: In connection with the preparation of this order judicial notice has been taken [of] the entire in this case in the custody of the District Clerk of Tom Green County, Texas as well as the appellate record.

B. ATTACHMENTS TO THIS ORDER: There are appended to this order attachments as follows:

Attachment 1: Copy of Application No. 1 for post conviction writ of habeas corpus filed April 11, 2002, on the form promulgated by the Court of Criminal Appeals, consisting of ten (10) pages

Attachment 2: Copy of Memorandum in support of Application No. 1 for post conviction writ of habeas corpus filed April 11, 2002, consisting of five (5) handwritten pages and seven (7) exhibits:

Exhibit 1: Copy of letter from petitioner to appellate counsel Duke E. Hooten, dated April 25, 1996, consisting of one (1) page

Exhibit 2: Letter from Clerk's Office Third Court of Appeals to petitioner, dated May 23, 1996, consisting of one (1) page

Exhibit 3: Letter from Petitioner to District Clerk Tom Green County dated September 4, 1997, consisting of one (1) page

Exhibit 4: (i) Copy of *ANDERS* brief, dated July 12, 1996, consisting of six (6) pages

(ii) Copy of Letter from appellate counsel to petitioner dated July 12, 1996, consisting of four (4) pages

Exhibit 5: (i) Copy of letter of transmittal of Judgment and Opinion from Third Court of Appeals, dated September 11, 1996, consisting of one page

(ii) Copy of Judgment of dismissal in Cause No. 03-96-00123, Third Court of Appeals, dated September 11, 1996, consisting of one (1) page

(iii) Copy of opinion in Cause No. 03-96-00123, Third Court of Appeals, dated September 11, 1996, consisting of two (2) pages

(iv) Copy of letter transmitting Mandate from Third Court of Appeals, dated November 15, 1996, consisting of one (1) page

(v) Copy of Mandate from Third Court of Appeals, dated November 15, 1996, consisting of one (1) page

Exhibit 6: Copy of affidavit of petitioner dated April 8, 2002, consisting of two (2) pages

Exhibit 7: Copy of ID – TDCJ time slip dated September 5, 2001, consisting of one (1) page

Attachment 3: Copy of indictment in Cause No. CR-91-0528-B, returned August 1, 1991, consisting of one (1) page

Attachment 4: Copy of trial court's written admonishments dated November 12, 1991, consisting of two (2) pages

Attachment 5: Copy of statements and waiver of defendant dated November 12, 1991, consisting of three (3) pages

Attachment 6: Copy of statement of plea bargain dated November 12, 1991, consisting of one (1) page

Attachment 7: Copy of defendant's waiver and stipulation of evidence dated November 12, 1991, consisting of one (1) page

Attachment 8: Copy of Amended Order Deferring Adjudication signed December 3, 1991, effective November 12, 1991, consisting of five (5) pages

Attachment 9: Copy of State's First Amended Motion to Revoke Deferred Adjudication Probation and to Proceed to Adjudicate Guilt, filed October 23, 1995, consisting of two (2) pages

Attachment 10: Copy of Judgment Adjudicating Guilt and Sentence dated November 6, 1995, consisting of five (5) pages

Attachment 11: Copy of defendant's Motion for New Trial, filed December 4, 1995, consisting of one (1) page

Attachment 12: Copy of defendant's Notice of Appeal, filed January 24, 1996, consisting of one (1) page

Attachment 13: Copies of docket sheets, five (5) pages

Attachment 14: Copy of Order of trial court designating issues to be determined, dated April 12, 2002, consisting of two (2) pages

Attachment 15: Copy of affidavit of Duke Hooten, appellate counsel, dated May 21, 2002, consisting of two (2) pages.

1. FACTS RE UNDERLYING CONVICTION: Defendant, CARLOS JIMENEZ, is herein referred to as "Jimenez", "defendant", or "petitioner." He was charged in paragraph one of the indictment (Attachment 3) with the offense of burglary of a habitation, a felony of the first degree, committed on or

about the 26th day of July, 1991, with paragraph two alleging one prior felony enhancement conviction for aggravated assault with a deadly weapon.

I find that the following chronological sequence of events material to this application took place. Where the event is shown by an attachment reference thereto by number is made. Not all events are covered by attachments, but they are supported by the materials examined and judicially noticed.

July 26, 1991	Date of commission of offense of burglary of a habitation
August 1, 1991	Defendant indicted (Attachment 3)
November 12, 1991	Bench trial; plea bargain for 5 years deferred adjudication; defendant duly admonished; plea of guilty entered; plea and plea bargain accepted. Order entered placing defendant on deferred adjudication probation for five years (Attachments 4, 5, 6, and 7)
December 3, 1991	Amended (nunc pro tunc) order deferring adjudication signed (Attachment 8)
June 1, 1994	State filed motion to revoke deferred adjudication probation

July 19, 1994	Motion to revoke dismissed; defendant placed back on deferred adjudication probation
March 3, 1995	State filed motion to revoke deferred adjudication probation
October 3, 1995	State filed first amended motion to revoke deferred adjudication probation (Attachment 9)
November 6, 1995	Bench trial; defendant entered plea of true to two probation violations and a plea of not true to two other probation violations. Court found all four allegations true, and adjudicated defendant. Sentence assessed at 43 years in the Institutional Division of the Texas Department of Criminal Justice. Order and Sentence signed. (Attachment 10)
December 4, 1995	Defendant filed motion for new trial (Attachment 11)
December 8, 1995	Court appointed attorney Duke Hooten to represent Jimenez on appeal
January 24, 1996	Attorney Duke Hooten filed notice of appeal (Attachment 12)

July 12, 1996 — Appeal having been perfected to Third Court of Appeals where case was docketed under No. 03-96-00123-CR, attorney Duke Hooten filed *ANDERS* brief (Attachment 2, Exhibit 4(i))

July 12, 1996 — Attorney Hooten wrote letter addressed to petitioner, setting forth status and rights, including right to file pro se brief and petition for discretionary review. This letter is marked "*HAND DELIVERED*." **Petitioner claims he never received this letter nor the copy of the brief from appellate counsel.** (Attachment 2, Exhibit 4(ii); Attachment 2)

September 11, 1996 — Third Court of Appeals in the light of appellate counsel's frivolous appeal brief **dismissed** the appeal (Attachment 2, Exhibit 5)

April 11, 2002 — Defendant's first application for post conviction writ of habeas corpus filed in the trial court (Attachment 1 and 2)

April 12, 2002 — Trial court's order designating issues signed (Attachment 14)

May 21, 2002 — Attorney Duke Hooten made affidavit regarding his representation and files.

2. APPEAL HISTORY OF UNDERLYING CONVICTION: Appeal to the Third Court of Appeals was duly and timely perfected. It was docketed in that court under No. 03-96-00123-CR. Appellate counsel filed an *ANDERS* brief dated July 12, 1996. (Attachment 2, Exhibit 4(i)) On the same date appellate counsel wrote a letter addressed to petitioner explaining his rights in light of the *ANDERS* brief to file a pro se brief and a petition for discretionary review. (Attachment 2, Exhibit 4(ii)). This letter is marked "*HAND DELIVERED.*" Petitioner claims he never received it or [a] copy of the brief from attorney Hooten (Attachment 2). Jimenez filed no pro se brief. The Third Court of Appeals dismissed the appeal on September 11, 1996. On November 15, 1996, the Third Court of Appeals issued its mandate.

3. PRIOR APPLICATIONS FOR POST-CONVICTION WRITS: There were none.

4. PRESENT APPLICATION FOR WRIT: This, the first application was filed in the trial court on April 11, 2002 (Attachments 1 and 2). Grounds raised are

A. Ineffective assistance of counsel: Claim of ineffective assistance of counsel in that appointed appellate counsel

(1) did not keep petitioner advised of the appellate process and petitioner did not receive a copy of the

Anders brief filed and a copy of the appellate opinion dismissing the appeal for lack of jurisdiction until after the Third Court of Appeals dismissed the appeal on September 11, 1996.

(2) certified that he hand delivered to petitioner at the Tom Green County Jail a letter dated July 12, 1996, advising petitioner of his appellate rights to file a pro se brief, when on that date petitioner was in custody of the Middleton Unit of the Texas Department of Criminal Justice; petitioner did not find out until September 1997 of the filing of the brief and the dismissal of the appeal by the Third Court of Appeals

B. 30-day option to be adjudicated: Claim that the trial court failed to inform petitioner that he had a right under *ARTICLE 42.12, Section 5(a) Texas Code of Criminal Procedure* to request and receive final adjudication upon written motion filed within 30 days after entering the plea for the deferred adjudication.

C. Denial of right to appeal: Claim that petitioner was denied his right to appeal.

5. DISCUSSION OF PETITONER'S CONTENTIONS:

A. Ineffective assistance of counsel: Claim of ineffective assistance of counsel in that appointed appellate counsel

(1) did not keep petitioner advised of the appellate process and petitioner did not receive a copy of the Anders brief filed and a copy of the appellate opinion

dismissing the appeal for lack of jurisdiction until after the Third Court of Appeals dismissed the appeal on September 11, 1996

(2) certified that he hand delivered to petitioner at the Tom Green County Jail a letter dated July 12, 1996, advising petitioner of his appellate rights to file a pro se brief, when on that date petitioner was in custody of the Middleton Unit of the Texas Department of Criminal Justice; petitioner did not find out until September 1997 of the filing of the brief and the dismissal of the appeal by the Third Court of Appeals.

In connection with this claim I find:

1. The affidavit of appellate counsel Duke Hooten (Attachment 15) is inconclusive and does not refute the allegations of the petitioner.

2. The letter from Duke Hooten dated July 12, 1996, addressed to the petitioner at the Tom Green County Jail (Attachment 2, Exhibit 4(ii)) could not have been hand delivered at the Tom Green County Jail, because a check with the Tom Green County Sheriff's office disclosed that Jimenez was released to Abilene authorities on April 4, 1996, and never thereafter returned to the Tom Green County Jail.

3. The official file maintained by the District Clerk of Tom Green County contains inquiries from Jimenez as to what was filed in the appeal and what happened to the appeal after the appeal was dismissed on September 11, 1996.

4. Neither the copy of the ANDERS brief or the letter dated July 12, 1996 was ever delivered by attorney Duke Hooten to the petitioner.

5. Petitioner did not learn of the dismissal of his appeal until September 1997.

6. The disposition of the instant application should not be considered on the grounds of ineffective assistance of counsel (which would require a harm analysis) but on the ground of deprivation of petitioner's right of appeal.

B. 30-day option to be adjudicated: Claim that the trial court failed to inform petitioner that he had a right under *ARTICLE 42.12, Section 5(a) Texas Code of Criminal Procedure* to request and receive final adjudication upon written motion filed within 30 days after entering the plea for the deferred adjudication. This ground I find to be without merit because the defendant was in effect advised of his to be adjudicated. I quote from Volume 2 of the Court Reporters transcript of the plea hearing on November 12, 1991:

> "The Court: Now, the Court having followed the terms of the plea agreement, I would at this time normally advise you as to your rights to appeal. However, on a deferred adjudications (sic) you have no right to appeal unless there was some adverse rulings and I don't find any under the docket sheet. Instead, you have a right

> for 30 days, in writing, to ask me to set aside the deferred adjudication and to enter a finding of guilt and go ahead and set the punishment. If you do not ask me to do that, then you will remain on the deferred until you have either completed it, granted an early release, if that should happen – that does not happen often but can happen – or until you should be revoked as the case may be.***" (Page 24 line 14 to Page 25, line 4)

C. Denial of right to appeal: Claim that petitioner was denied his right to appeal. While I personally feel after reading the record, since Jimenez entered a plea of true to two of the four allegations of probation violation, and since the evidence as to the other two violations is established beyond a reasonable doubt by the testimony, an appeal would not be successful, nevertheless petitioner had not received the full measure of his *right to appeal*. He was not afforded the right to examine the record, and the right to file a pro se brief. Please see the trial court's findings under A, supra. Accordingly I recommend that petitioner be given an out-of time appeal. If appointed counsel should reach the same conclusion that the appeal is frivolous, then petitioner should be afforded the right to examine the record and file a pro se brief.

6. RECOMMENDATION OF THE TRIAL COURT ON PETITIONER'S CONTENTIONS: All information necessary for disposition of this application is contained in the records and file of the case as judicially noticed, and/or the appellate record, as well

as the attachments, and an evidentiary hearing would add nothing. I recommend that petitioner be granted an out of time appeal.

***

SIGNED this the 19th day of July, 2002

Curt F. Steib
Senior District Judge Presiding

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 74,433

EX PARTE CARLOS JIMENEZ, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM TOM GREEN COUNTY COUNTY

The opinion was delivered per curiam.

OPINION

This is a post-conviction application for a writ of habeas corpus filed pursuant to Article 11.07, V.A.C.C.P. Applicant was convicted of burglar of a habitation and punishment was assessed at forty-three years imprisonment. Applicants' appeal was dismissed. Jimenez v. State, 03-96-00123-CR (Tex. App.—Austin, delivered September 11, 1996, no pet.).

Applicant contends that he was denied his right to a meaningful appeal when his counsel failed to comply with the requirements of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Specifically, Applicant contends that he was denied his right to file a *pro se* brief. The trial court entered

findings of fact and conclusions of law, supported by the record, recommending that an out-of-time appeal be granted.

Relief is granted. Applicant is entitled to an out-of-time appeal in cause number CR-91-0528-B in the 119th Judicial District Court of Tom Green County. Applicant is ordered returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure, all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. We hold that should Applicant desire to prosecute an appeal, he must take affirmative steps to see that written notice of appeal is given within thirty days after the mandate of this Court has issued.

DELIVERED: September 25, 2002

DO NOT PUBLISH

APPENDIX F

TEXAS COURT OF CRIMINAL APPEALS
Austin, Texas

MANDATE

THE STATE OF TEXAS

TO THE 119TH JUDICIAL DISTRICT COURT OF TOM GREEN COUNTY – GREETINGS:

Before our **COURT OF CRIMINAL APPEALS**, on the **25th** day of **SEPTEMBER**, A.D. 2002, the cause upon an Application for Writ of Habeas Corpus styled:

EX PARTE CARLOS JIMENEZ

CCRA No. **74,433**

Tr. Crt. No. **CR-91-0528-B=WRIT NO. 1**
was determined; and therein our said **COURT OF CRIMINAL APPEALS** made its order in these words: "This cause came on to be heard on the Application for Writ of Habeas Corpus, and the same being considered, because it is the Opinion of this Court that the relief prayed for should be Granted, it is **ORDERED, ADJUDGED AND DECREED** that an **out-of time appeal** is **GRANTED**, in accordance with the Opinion of this Court, and that this Decision be certified below for Observance."

WHEREFORE, We command you to observe the order of our said **COURT OF CRIMINAL APPEAL** in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, **THE HONORABLE SHARON KELLER**,
Presiding Judge
of our said **COURT OF CRIMINAL APPEALS**.
with the Seal thereof annexed, at the City of Austin,
this **21st** day of **October**, A.D. 2002
TROY C. BENNETT, JR., Clerk
VERONICA ARRELANO, Deputy Clerk

APPENDIX G

NO. 03-02-0073-CR

IN THE
COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AT AUSTIN

CARLOS JIMENEZ,

Appellant

VS.

THE STATE OF TEXAS,

Appellee

ON APPEAL IN CAUSE NO.CR-91-0528-B IN THE
119th DISTRICT COURT OF
TOM GREEN COUNTY, TEXAS
HON. JOHN SUTTON, JUDGE PRESIDING

BRIEF FOR APPELLANT

SHAWNTELL MCKILLOP
ATTORNEY FOR
APPELLANT
40 W. TWOHIG, SUITE 105
San Angelo, Texas 76903
(915) 486-9800
Fax: (915) 482-0565
State Bar No. 24007655

Attorney for State
December 30, 2002

NAMES OF PARTIES

So that members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case, the State certifies, pursuant to the requirements of Texas Rules of Appellate Procedure 38.1(a), that the following is a complete list of the names of all parties and their attorneys:

a) The State of Texas, Appellee, by Stephen Smith, 119th Judicial District Attorney, 124 W. Beauregard, San Angelo, Texas 76903; and

b) Shawntell McKillop, Appellant's Attorney, 40 W. Twohig, STE. 105, San Angelo, Texas 76903; and

c) Carlos Jimenez, Appellant, Telford Unit, TDC # 745196, P.O. Box 9200, New Boston, Texas 75570; and

d) Louis Perez, Appellant's Trial Counsel, 112 W. College Ave., San Angelo, Texas 76903.

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NO. 03-02-0073-CR

IN THE
COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AT AUSTIN

CARLOS JIMENEZ,

Appellant

VS.

THE STATE OF TEXAS,

Appellee

ON APPEAL IN CAUSE NO.CR-91-0528-B IN THE
119th DISTRICT COURT OF
TOM GREEN COUNTY, TEXAS
HON. JOHN SUTTON, JUDGE PRESIDING

BRIEF FOR APPELLANT

COMES NOW, CARLOS JIMENEZ, and through his undersigned court-appointed counsel submits this brief which concludes there are no meritorious points on which to appeal from the order adjudicating his guilt and sentencing him to confinement. In the brief which follows Carlos Jimenez will be referred to as "Appellant" and the State of Texas will be referred to as "Appellee."

STATEMENT OF THE CASE

This is an appeal from a judgment adjudicating guilt and sentence (C.R. 35-41) entered in Cause No. CR 91-0528-B, Styled State of Texas v. Carlos Jimenez, before the 119th Judicial District Court of Tom Green County, Texas, the honorable John Sutton presiding.

On August 1, 1991, an indictment was returned by the 119th Grand Jury wherein Appellant was charged with Burglary of a Habitation and a prior conviction of Aggravated Assault with a Deadly Weapon (C.R. 1).

On November 12, 1991 Appellant signed various statutorily required admonishments and waivers along with a stipulation of evidence (C.R. 7-13). On that same date, the 119th District Court of Tom Green County, Texas heard Appellant's plea of Guilt to Paragraph 1 of the indictment and in accordance with a plea bargain agreement found the evidence sufficient to establish Appellant's guilt but deferred further proceedings and placed Appellant on deferred adjudication probation for a period of five years (C.R. 15-20).

On October 23, 1995, Appellee filed the State's First Amended Motion to Revoke Deferred Adjudication Probation and to Proceed to Adjudicate Guilt alleging four violations of the terms of Appellant's probation (C.R. 32-33).

On November 6, 1995, a hearing on Appellee's Motion to Revoke was conducted and upon conclusion the trial court found the violations alleged in

paragraph III, subparagraphs 1 through 4 to be true, adjudicated Appellant guilt[y] of Burglary of a Habitation, enhanced with one prior felony conviction and sentenced him to 43 years confinement in the Institutional Division of the Texas Department of Criminal Justice (C.R. 35-39).

Appellant caused to be filed a timely Motion for New Trial (C.R. 47) and Notice of Appeal (C.R. 49). On July 15, 1996 Appellant's counsel field an Ander's Brief under Cause No. 03-96-00123-CR, in the Third Court of Appeals, Austin, Texas.

Appellant's appeal was dismissed. Jimenez v. State, 03-96-00123-CR (Tex. App.—Austin, 1996, no pet.).

On April 11, 2002 Appellant filed an application for Writ of Habeas Corpus with the Court of Criminal Appeals of Texas alleging that he was denied his right to file a pro se brief. On September 25, 2002, the Court of Criminal Appeals of Texas in Cause No. 74,433 granted the application for an out of time appeal and returned the Appellant to the point in time where he may give written notice of appeal. Appellant's counsel timely filed a new notice of appeal on October 25, 2002 with the Third Court of Appeals in Austin.

ISSUES PRESENTED

POINT OF ERROR NUMBER ONE

WHETHER THE TRIAL COURT ERRED BY ABUSE OF DISCRETION WHEN THE APPELLANT PLED TRUE TO TWO

PARAGRAPHS ON A MOTION TO REVOKE DEFERRED ADJUDICATION AND THE TRIAL COURT SET PUNISHMENT IN THE RANGE ALLOWED BY LAW.

STATEMENT OF FACTS

The hearing on the Appellee's First Amended Motion to Revoke Probation commenced on November 6, 1995, the Honorable John Sutton presiding (R.R. vol.3, p.2). The Appellant was advised that the range of punishment upon a revocation of his probation was fifteen years to 99 years or life in the Institutional Division of the Texas Department of Criminal Justice (R.R. vol.3,p.5). The Motion to Revoke was read aloud to the Appellant (R.R. vol.3,p.10-14). The Appellant was asked how he plead and he plead True to paragraphs 2 and 4, while pleading Not True to paragraphs 1 and 3 (R.R. vol3,p.14-15).

The trial court further admonished the Appellant that by the plea of true to these allegations aloe his probation could be revoked (R.R. vol.3,p.15). The trial court inquired into whether the Appellant understood and the Appellant responded "yes, sir" (*Id*). The trial court inquired if there was a plea agreement in connection with the case and Appellee's attorney responded in the negative (R.R. vol.3,p.16). The trial court inquired to whether the plea was free and voluntary and the Appellant responded in the affirmative (R.R. vol.3,p.17). The trial court inquired whether the Appellant was pleading true because he was afraid of something, because he had been pressured, or because someone had mad some promise

as to what the outcome of the hearing may be and the Appellant responded in the negative (*Id*).

The record reflects that the Appellee's First Amended Motion to Revoke Deferred Adjudication contained 4 separate allegations of violations of Appellant's probation conditions (C.R. 40-41).

In summary, the first alleged violation concerned an assault causing bodily injury to Teresa Barron (*Id*).

The second violation alleged that the Appellant failed to report in person to probation on twenty-two different dates (*Id.*)

The third violation alleged that the Appellant failed to report his arrest of August 24, 1994 to the probation office within 48 hours (*Id.*)

The fourth violation alleged that the Appellant was delinquent in payment of fees in the amount of $550,84 (*Id*).

The Appellant pled true to paragraphs two and four (R.R. vol.3, p.15).

Appellee called Teresa Barron as a witness (R.R. vol.3, p.23). She reluctantly testified that on August 26, 1994 Carlos Jimenez and herself got in a fight that resulted in the Appellant grabbing her hair, forcing her to the ground and kicking her several times in the fact (R.R. vol.3,p.28-29). She also testified that the Appellant was arrested on that night (*Id* at 33).

Officer Ed Kading testified that he was called to the scene in question and observed Teresa Barron with a chipped tooth and blood coming from her nose (*Id* at 36). Ms. Barron told the officer that her boyfriend had done it and then pointed to the Appellant. (*Id* at 40).

Elaine Moore testified that she was the supervising probation officer of the Appellant (*Id* at 51). Ms. Moore testified that she became aware of the Appellant's arrest on September 1, 1994 and that the Appellant had not contacted her in regard to the arrest (*Id* at 53). Ms. Moore also testified that the Appellant reported his arrest on September 9, 1994 to Officer Larry Ward (*Id*).

Appellant denied that he intentionally kicked Teresa Barron in the face (*Id.* at 84). Appellant also testified that he [had] been through the Court Residential Treatment Center (*Id* at 107). Appellant also testified that he was placed on electronic monitoring while on probation due to a bar fight (*Id* at 96).

The Appellee urged the trial court to impose the minimum sentence of fifteen years (*Id* at 111). The Appellant's counsel urged the trial court to show mercy and continue the probation (*Id* at 112). The trial court sentenced Appellant to forty three years in prison (*Id* at 117).

SUMMARY OF POTENTIAL ARGUMENT

Appellant's potential argument is that the trial Court abused its discretion in revoking his probation. However Appellant pled true to two of the paragraphs

in The Motion to Revoke and the trial court assessed punishment within the range allowed by law.

ANALYSIS OF POTENTIAL LAW

In a probation revocation proceeding where several violations are alleged, proof of any single violation of a condition of probation is sufficient to support a revocation order, and for this reason an appellate court need only consider whether the record contains sufficient proof of any one violation. *Moore v. State*, 605 S.W.2d 924 (Tex. Crim. App.—1980); *Jones v. State*, 571 S.W.2d 191 (Tex. Crim. App.—1978).

In the instant case there were four violations of probation. Appellant's plea of true to two of them is sufficient to support proof by a preponderance of the evidence. For this reason it does not appear that there can be any complaint about the sufficiency of the evidence in regard to two of the four violations. In a probation revocation hearing the State must prove by a preponderance of the evidence that Appellant violated a condition of his probation. *Todd v. State*, 851 S.W.2d 871 (Tex. Crim. App.—1993). Appellate review of an order revoking probation is normally limited to a determination of whether the trial court abused its discretion. *Degay v. State*, 741 S.W.2d 445 (Tex. Crim. App.—1987). Unless there is some procedural defect or substantive error which can be said to apply to all the conditions of probation, there is no merit to this appeal.

Appellant [chose] to admit two violations and sought leniency from the court. The court did not show

the leniency he expected and he is upset with the results.

Appellant's counsel has thoroughly reviewed the record before this Court. There is ample evidence in the record that Appellant was advised of the range of punishment and entered his true plea freely and voluntarily. Under the established rule that if only violation of probation is sufficiently proven, a revocation will be upheld, and there appears to be no legitimate grounds for appeal.

CONCLUSION

In summary counsel has reviewed the record and can find no reversible error or legitimate ground for appeal. Counsel has, with this filing of this Brief served upon Appellant a copy of this Brief, along with a letter to Appellant, a copy of which is attached as Exhibit "A" advising Appellant of counsel's conclusions, and further advising Appellant he has thirty (30) days from receipt of that correspondence within which to submit his own pro se brief. Counsel has also provided Appellant with the entire Clerk's Record and Reporter's Record so that he may prepare his own brief.

Counsel has further prepared a motion to withdraw and stands ready to tender it to the trial court upon direction from this Court.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully submits this brief for the

Court's consideration. This brief is submitted under the requirements of *Anders v. California*, 386 U.S. 738 (1967).

Respectfully submitted,
Shawntell McKillop
Attorney for Appellant
State Bar No. 24007655
40 W. Twohig, Suite 105
San Angelo, Texas 76903
(915) 486-9800

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing Brief for State was mailed by U.S. Mail, first class to the office of the Appellee's attorney of record, Stephen Smith, 124 W. Beauregard, San Angelo, Texas 76903, on this the 30th day of December, 2002.

Shawntell McKillop

APPENDIX H

TEXAS COURT OF APPEALS, THIRD DISTRICT AT AUSTIN

No. 03-02-00733-CR

Carlos Jimenez, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 119TH JUDICIAL DISTRICT NO. CR91-0528-B, HONORABLE JOHN E. SUTTON, JUDGE PRESIDING

MEMORANDUM OPINION

Appellant Carlos Jimenez was placed on deferred adjudication community supervision after he pleaded guilty to burglary of a habitation. *See* Tex. Pen. Code Ann. § 30.02 (West 2003). Four years later, the district court revoked supervision, adjudged him

guilty, and assessed punishment at forty-three years' imprisonment.[1]

Appellant's court-appointed attorney filed a brief concluding that the appeal is frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738 (1967), by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See also Penson v. Ohio*, 488 U.S. 75 (1988); *High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978); *Currie v. State*, 516 S.W.2d 684 (Tex. Crim. App. 1974); *Jackson v. State*, 485 S.W.2d 553 (Tex. Crim. App. 1972); *Gainous v. State*, 436 S.W.2d 137 (Tex. Crim. App. 1969). Appellant exercised his right to examine the appellate record and also filed a pro se brief containing three issues or points of error.

In pro se points two and three, appellant contends his guilty plea was involuntary and he was denied due process because he was not fully admonished at the time he pleaded guilty regarding the consequences of a violation of supervision. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 5(a) (West Supp. 2003). A defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding only in an appeal taken when supervision is imposed. *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999); *see also Nix v. State*, 65 S.W.3d 664, 672 (Tex. Crim. App.

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[1] Sentence was imposed in November 1995. Appellant was later granted an out-of-time appeal. *Ex parte Jimenez*, No. 74,433 (Tex. Crim. App. Sept. 25, 2002) (not designated for publication).

2001) (*Manuel* retroactive). Thus, these points present nothing for review.

In his first pro se point of error, appellant urges that he was denied his due process right to a neutral and detached magistrate at the sentencing hearing. In effect, appellant argues that the district did not consider any of the evidence adduced at the hearing but instead assessed a predetermined punishment. Appellant relies on three opinions. In *Jefferson v. State*, 803 S.W.2d 470 (Tex. App.—Dallas 1991, pet. ref'd), the trial judge expressly promised the defendant at the time he deferred adjudication that he would assess the maximum punishment if the defendant violated his supervision. Later, at the adjudication hearing, the judge reminded the defendant of his promise and imposed the maximum sentence. The court of appeals concluded that the judge denied the defendant due process by failing to give him a meaningful punishment hearing. *Id.* at 472. *Jefferson* was followed in *Howard v. State*, 830 S.W.2d 785 (Tex. App.—San Antonio 1992, pet. ref'd), and *Earley v. State*, 855 S.W.2d 260 (Tex. App.—Corpus Christi 1993), *pet. dism'd, improvidently granted*, 872 S.W.2d 758 (Tex. Crim. App. 1994). As in *Jefferson*, the records in *Howard* and *Early* showed that the trial judge who revoked deferred adjudication supervision assessed a punishment that had been predetermined at the time supervision was granted, without considering any evidence that might have been adduced at the punishment hearing.

The record before us in this cause includes the original guilty plea proceeding. The court admonished appellant that if his supervision were to be revoked

and his guilt adjudicated, he would be subject to the maximum punishment of ninety-nine years or life. The court added, "Now I don't know what you will get because I don't know all the fact that are involved, but if you believe it [that you will get the maximum] you will make it through it [without being revoked]." In other words, the court did not promise or otherwise bind itself to a predetermined punishment should supervision be revoked, but urged appellant to assume the worst as a means of motivating himself to obey the conditions of supervision.

In addition, the record from the adjudication and sentencing hearing reflects that the court assessed the punishment it did after considering all the evidence before it. The court told appellant, "The P.S.I. reflects, Mr. Jimenez, a long and regular criminal history by you; including ... your prior aggravated assault with a deadly weapon .... And now we are having family violence arguments that you minimize .... You can't even admit to your own violent tendency there."[2] The court announced that the forty-three-year punishment determination was based on appellant's "total history." We find no basis for concluding that the court denied due process by predetermining the punishment in advance of the hearing. Pro se point one is overruled.

In addition to two violations of supervision admitted by appellant, the court also found after hearing testimony that appellant assaulted his wife while on supervision, an allegation he denied.

We have reviewed the record, counsel's brief, and the pro se brief. We find nothing in the record that might arguably support the appeal.

The judgment of conviction is affirmed.

Jan P. Patterson, Justice

Before Justices Kidd, Patterson and Puryear
Affirmed
Field: May 15, 2003
Do Not Publish

APPENDIX I

No. CR-91-0528-B=WRIT # 2

EX PARTE CARLOS JIMENEZ

IN THE 119TH DISTRICT COURT OF TOM GREEN COUNTY, TEXAS

ORDER OF TRIAL, COURT RECOMMENDING DENIAL OF DEFENDANT'S APPLICATION NO.2 FOR POST CONVICTION WRIT OF HABEAS CORPUS

A. RECORDS AND DOCUMENTS CONSIDERED UNDER JUDICIAL NOTICE: In connection with the preparation of this order judicial notice has been taken the entire file in this case in the custody of the District Clerk of Tom Green County, Texas as well as the appellate record.

B. ATTACHMENTS TO THE PREVIOUS ORDER OF JULY 19, 2002: The petitioner has filed a previous application (Application No. 1) which was the subject of an order by the trial court dated July 19, 2002, and which is herein referred to as the *previous order*. It was docketed in the Court of Criminal Appeals under No. 74,433 which granted an out of time appeal on September 25, 2002.

Appended to the previous order were 15 attachments, which are listed here.

Attachment 1: Copy of Application No. 1 for post conviction writ of habeas corpus filed April 11, 2002, on the form promulgated by the Court of Criminal Appeals, consisting of ten (10) pages

Attachment 2: Copy of Memorandum in support of Application No. 1 for post conviction writ of habeas corpus filed April 11, 2002, consisting of five (5) handwritten pages and seven (7) exhibits:

Exhibit 1: Copy of letter from petitioner to appellate counsel Duke E. Hooten, dated April 25, 1996, consisting of one (1) page

Exhibit 2: Letter from Clerk's Office Third Court of Appeals to petitioner, dated May 23, 1996, consisting of one (1) page

Exhibit 3: Letter from Petitioner to District Clerk Tom Green County dated September 4, 1997, consisting of one (1) page

Exhibit 4: (i) Copy of *ANDERS* brief, dated July 12, 1996, consisting of six (6) pages

(ii) Copy of Letter from appellate counsel to petitioner dated July 12, 1996, consisting of four (4) pages

Exhibit 5: (i) Copy of letter of transmittal of Judgment and Opinion from Third Court of Appeals, dated September 11, 1996, consisting of one page

(ii) Copy of Judgment of dismissal in Cause No. 03-96-00123, Third Court of Appeals, dated September 11, 1996, consisting of one (1) page

(iii) Copy of opinion in Cause No. 03-96-00123, Third Court of Appeals, dated September 11, 1996, consisting of two (2) pages

(iv) Copy of letter transmitting Mandate from Third Court of Appeals, dated November 15, 1996, consisting of one (1) page

(v) Copy of Mandate from Third Court of Appeals, dated November 15, 1996, consisting of one (1) page

Exhibit 6: Copy of affidavit of petitioner dated April 8, 2002, consisting of two (2) pages

Exhibit 7: Copy of ID – TDCJ time slip dated September 5, 2001, consisting of one (1) page

Attachment 3: Copy of indictment in Cause No. CR-91-0528-B, returned August 1, 1991, consisting of one (1) page

Attachment 4: Copy of trial court's written admonishments dated November 12, 1991, consisting of two (2) pages

Attachment 5: Copy of statements and waiver of defendant dated November 12, 1991, consisting of three (3) pages

Attachment 6: Copy of statement of plea bargain dated November 12, 1991, consisting of one (1) page

Attachment 7: Copy of defendant's waiver and stipulation of evidence dated November 12, 1991, consisting of one (1) page

Attachment 8: Copy of Amended Order Deferring Adjudication signed December 3, 1991, effective November 12, 1991, consisting of five (5) pages

Attachment 9: Copy of State's First Amended Motion to Revoke Deferred Adjudication Probation and to Proceed to Adjudicate Guilt, filed October 23, 1995, consisting of two (2) pages

Attachment 10: Copy of Judgment Adjudicating Guilt and Sentence dated November 6, 1995, consisting of five (5) pages

Attachment 11: Copy of defendant's Motion for New Trial, filed December 4, 1995, consisting of one (1) page

Attachment 12: Copy of defendant's Notice of Appeal, filed January 24, 1996, consisting of one (1) page

Attachment 13: Copies of docket sheets, five (5) pages

Attachment 14: Copy of Order of trial court designating issues to be determined, dated April 12, 2002, consisting of two (2) pages

Attachment 15: Copy of affidavit of Duke Hooten, appellate counsel, dated May 21, 2002, consisting of two (2) pages

C. ATTACHMENTS TO THIS ORDER: There are appended to this order six (6) additional attachments:

Attachment 16: Copy of application No. 2 for post-conviction writ of habeas corpus filed on December 6, 2004, on the form promulgated by the Court of Criminal Appeals, consisting of 14 pages.

Attachment 17: Copy of order of the trial court designating issues to be determined in connection with application No. 2, dated December 8, 2004, consisting of two (2) pages

Attachment 18: Copy of letter from habeas judge dated December 8, 2004, to defense counsel requesting verified response, consisting of two (2) pages

Attachment 19: Copy of affidavit of Louis Perez dated January 8, 2005, consisting of two (2) pages, and three (3) appendages:

Exhibit A: Copy of employment contract dated May 2, 1995, one (1) page

Exhibit B: Copy of affidavit of Teresa Barron, dated May 9, 1995, one (1) page

Exhibit C: Copy of State's First Amended Motion to revoke deferred adjudication probation and to proceed to adjudicate

guilt, filed October 3, 1995, two (2) pages

Exhibit D: Copy of pre-sentence investigation report dated October 25, 1995, seven (7) pages

Attachment 20: Copy of affidavit of Charlotte Harris, dated January 10, 2005, consisting of three (3) pages

Attachment 21: Copy of reporter's record of the deferred adjudication hearing of November 12, 1991, consisting of 26 pages

Attachment 22: Copy of unpublished memorandum opinion of the Third Court of Appeals in Austin in Cause No. 03-02-00733-CR filed May 15, 2003, affirming the judgment and sentence of the trial court, consisting of four (4) pages

This order may make periodic reference to pertinent documents which were attached to the previous order to this order. The reference will identify the attachment(s) by the number listed above.

1. FACTS RE UNDERLYING CONVICTION: Defendant, CARLOS JIMENEZ, is herein referred to as "Jimenez," "defendant," or "petitioner." He was charged in paragraph one of the indictment (Attachment 3) with the offense of burglary of a habitation, a felony of the first degree, committed on or

about the 26th day of July, 1991, with paragraph two alleging one prior felony enhancement conviction for aggravated assault with a deadly weapon.

I find that the following chronological sequence of events material to this application took place. Where the event is shown by an attachment reference thereto by number is made. Not all events are covered by attachments, but they are supported by the materials examined and judicially noticed.

July 26, 1991	Date of commission of offense of burglary of a habitation
August 1, 1991	Defendant indicted (Attachment 3)
November 12, 1991	Bench trial; plea bargain for 5 years deferred adjudication; defendant duly admonished; plea of guilty entered; plea and plea bargain accepted. Order entered placing defendant on deferred adjudication probation for five years (Attachments 4, 5, 6, and 7)
December 3, 1991	Amended (nunc pro tunc) order deferring adjudication signed (Attachment 8)
June 1, 1994	State filed motion to revoke deferred adjudication probation

July 19, 1994	Motion to revoke dismissed; defendant placed back on deferred adjudication probation
March 3, 1995	State filed motion to revoke deferred adjudication probation
October 3, 1995	State filed first amended motion to revoke deferred adjudication probation (Attachment 9)
November 6, 1995	Bench trial; defendant entered plea of true to two probation violations and a plea of not true to two other probation violations. Court found all four allegations true, and adjudicated defendant. Sentence assessed at 43 years in the Institutional Division of the Texas Department of Criminal Justice. Order and Sentence signed. (Attachment 10)
December 4, 1995	Defendant filed motion for new trial (Attachment 11)
December 8, 1995	Court appointed attorney Duke Hooten to represent Jimenez on appeal
January 24, 1996	Attorney Duke Hooten filed notice of appeal (Attachment 12)

July 12, 1996 — Appeal having been perfected to Third Court of Appeals where case was docketed under No. 03-96-00123-CR, attorney Duke Hooten filed *ANDERS* brief (Attachment 2, Exhibit 4(I))

July 12, 1996 — Attorney Hooten wrote letter addressed to petitioner, setting forth status and rights, including right to file pro se brief and petition for discretionary review. This letter is marked *"HAND DELIVERED."* **Petitioner claims he never received this letter nor the copy of the brief from appellate counsel.** (Attachment 2, Exhibit 4(ii); Attachment 2)

September 11, 1996 — Third Court of Appeals in the light of appellate counsel's frivolous appeal brief **dismissed** the appeal (Attachment 2, Exhibit 5)

April 11, 2002 — Defendant's first application for post conviction writ of habeas corpus filed in the trial court (Attachment 1 and 2)

April 12, 2002 — Trial court's order designating issues signed (Attachment 14)

May 21, 2002	Attorney Duke Hooten made affidavit regarding his representation and files.
July 19, 2002	Order of the trial court on application No. 1 filed; trial court recommended that defendant be granted an out of time appeal
September 25, 2002	Court of Criminal Appeals in Cause No. 74,433 granted habeas relief on application No. 1 in the form of an out of time appeal
October 21, 2002	Court of Criminal Appeals issued mandate on relief granted on application No. 1
October 25, 2002	Attorney Shawntell McKillop appointed appellate counsel on out of time appeal; she perfected appeal to Third Court of Appeals in Austin, where appeal was docketed under no. 03-02-00733-CR
May 15, 2003	Third Court of Appeals in Austin in No. 03-02-00733-CR by an unpublished opinion (Attachment 22) affirmed the judgment and sentence of the trial court
November 19, 2003	Third Court of Appeals in Austin in No. 03-02-00733-CR issued the mandate

December 6, 2004 Petitioner filed in the trial court his application No.2 for post conviction habeas corpus (Attachment 16)

December 8, 2004 Trial court entered order designating issues to be resolved in Application No. 2 (Attachment 17)

December 8, 2004 Trial court forwarded copy of order designating issues to trial counsel with requests for affidavits (Attachment 18)

2. APPEAL HISTORY OF UNDERLYING CONVICTION: *First Appeal*: The first appeal to the Third Court of Appeals was duly and timely perfected. It was docketed in that court under No. 03-96-00123-CR. Appellate counsel filed an *ANDERS* brief dated July 12, 1996. (Attachment 2, Exhibit 4(I)) On the same date appellate counsel wrote a letter addressed to petitioner explaining his rights in light of the *ANDERS* brief to file a pro se brief and a petition for discretionary review. (Attachment 2, Exhibit 4 (ii)). This letter is marked *"HAND DELIVERED."* Petitioner claims he never received it or [a] copy of the brief from attorney Hooten (Attachment 2). Jimenez filed no pro se brief. The Third Court of Appeals dismissed the appeal on September 11, 1996. On November 15, 1996, the Third Court of Appeals issued its mandate.

Second Appeal: The Court of Criminal Appeals granted habeas relief on petitioner's application No. 1 by authorizing an out of time appeal. This *second appeal* was duly perfected. Shawntell McKillop, appointed appellate Counsel, filed an *Anders* brief. Jimenez exercised his right to examine the appellate record and also filed a pro se brief containing three points of error:

Point One: Jimenez urged that he was denied his due process right to a neutral and detached magistrate at the sentencing hearing. In effect he argued that the district court did not consider any of the evidence adduced at the hearing but instead assessed a predetermined punishment. The Court of Appeals in its memorandum (Attachment 22) found:

(1) The authorities cited by Jimenez were not in point because an analysis of the records showed that the trial judge(s) there assessed a punishment that had been predetermined at the time the deferred adjudication was granted.

(2) Reviewing the record (Attachment 21) the Court held that the trial judge did not promise or otherwise bind himself to a predetermined punishment should supervision be revoked, but urged defendant to assume the worst as a means of motivating himself to obey the conditions of supervision.

(3) In addition the record reflected that the trial judge assessed the punishment after

considering all the evidence and that the 43 year punishment was based on defendant's total history. Finding no basis for concluding that the trial court denied due process point one was overruled.

Points Two and Three: Jimenez contended that his guilty plea was involuntary and he was denied due process because he was not fully admonished on the consequences of a violation of deferred adjudication probation at the time he entered his plea of guilty. The Court of Appeals, pointing out that a defendant placed on deferred adjudication probation may raise issues relating to the original plea proceeding only in an appeal taken when supervision is imposed cited *MANUEL V. STATE*, 994 S.W.2d 658, 661-62 (Tex.Crim.App. 1999) and *NIX V. STATE*, 65 S.W.3d 664, 672 (Tex.Crim.App. 2001). The Court held that points two and three presented nothing for review.

The Court of Appeals found nothing in the record on the second appeal that might arguably support the appeal.

3. PRIOR APPLICATIONS FOR POST-CONVICTION WRITS: The first application was filed in the trial court on April 11, 2002 (Attachments 1 and 2). Grounds raised were:

A. Claim of ineffective assistance of counsel in that appointed counsel did not keep petitioner advised of the appellate process and petitioner did not receive a copy of the Anders brief filed and certified that he hand

delivered to petitioner at the Tom Green County Jail a letter dated July 12, 1996, advising petitioner of his appellate rights to file a pro se brief, when on that date petitioner was in custody of the Middleton Unit of the Texas Department of Criminal Justice;

B. Claim that the trial court failed to inform petitioner that he had a right under *ARTICLE 42.12, Section 5(a) Texas Code of Criminal Procedure* to request and receive final adjudication upon written motion filed within 30 days after entering the plea for the deferred adjudication.

C. Claim that petitioner was denied his right to appeal.

The habeas judge recommended that petitioner be granted an out of time appeal, which recommendation was followed by the Court of Criminal Appeals.

4. PRESENT APPLICATION FOR WRIT: The present application No. 2 was filed in the trial court on December 6, 2004. The grounds presented are:

1. Grounds One and Three: *Ineffective assistance of counsel by Charlotte Harris in the proceedings which resulted in the grant of a deferred adjudication on November 12, 1991,* in that she

(A) failed to inform petitioner of the effects of enhancement convictions and the consequences of a deferred adjudication

(B) misled the petitioner by telling him erroneously that he could get 35 years federal time or 25 years in TDCJ for the crime with which he was charged

and as a result of these instances of ineffective assistance of counsel by Charlotte Harris, that

(C) petitioner's plea of guilty was not made freely and voluntarily

2. Grounds Two and Four:

(A) *That petitioner was denied due process because he was not afforded a neutral and detached officer (i.e. judge) at his revocation (adjudication) hearing on November 6, 1995, in that the trial judge failed to honor the agreement between the district attorney and defense counsel and was biased against petitioner.*

(B) *Ineffective assistance of counsel by Louis Perez, who allegedly induced petitioner to plead true to probation violations at the time of the adjudication hearing on November 6, 1995 with the representation that petitioner would receive at most 15 years in the penitentiary.*

(C) *Ineffective assistance of counsel by Louis Perez, who failed to object to and request the disqualification of the trial Judge John E. Sutton to preside because of the judge's bias, prejudice and vindictiveness at the time of the adjudication hearing on November 6, 1995.*

5. DISCUSSION OF PETITIONER'S CONTENTIONS:

1. Grounds One and Three: *Ineffective assistance of counsel by Charlotte Harris in the proceedings which resulted in the grant of a deferred adjudication on November 12, 1991*:

(A) Claim that Charlotte Harris failed to inform petitioner of the effects of enhancement convictions and the consequences of a deferred adjudication. The defendant executed a written statement under oath (Attachment 5 item [17]) that Harris explained to him Attachments 4 and 5. Attachment 4 set out in writing the range of punishment for a felony of the first degree as well as the range of punishment of a felony of the first degree with a prior felony conviction. In addition the verbal admonitions of the court (Attachment 21 pages 3-4) explained to the defendant the same ranges of punishment. Also, the court orally admonished the defendant before he entered his plea of guilty how deferred adjudication worked and explained the consequences of deferred adjudication. Jimenez acknowledged that he understood. (Attachment 21 pages 9 et seq.)

Charlotte Harris, petitioner's defense counsel, states in her affidavit (Attachment 20) that she has no independent recollection, but she unequivocally denies Jimenez [sic] contentions; her denial was based on her examination of the record and materials available.

I find Jimenez' [sic] claim on this point to be false and completely without merit.

(B) Claim the [sic] Charlotte Harris misled the petitioner by telling him erroneously that he could get 35 years federal time or 25 years in TDCJ for the crime with which he was charge. Charlotte Harris denies the "35 years federal time claim" in its entirety (Attachment 20). While she does not have an independent recollection due to the passage of some 12 years between the time of petitioner's plea and the present, she sets forth her practice which militates against Jimenez' [sic] allegations.

I find Jimenez' [sic] claim on this point to be without merit.

(C) Petitioner's next claim is that as a result of the claims in (A) and (B) his plea of guilty was not made freely and voluntarily. On November 12, 1991, Jimenez stated in writing, under oath, that his plea was freely and voluntarily made (Attachment 5, item 12). The trial judge orally inquired of the defendant beginning at line 1 of Attachment 21:

"The Court: Your plea of guilty and plea of true in this case, is that a free and voluntary plea?

The defendant: Yes, sir.

The Court: Have you pled guilty out of fear?

The defendant: No, sir.

The Court: Have you pled guilty because you have been pressured, abused or mistreated?

The defendant: No, sir.

The Court: Have you pled guilty because someone has made some type of promise to you other than this recommendation?

The defendant: No, sir.

The Court: Has someone persuaded you or talked you into pleading guilty?

The defendant: No, sir.

The Court: Have you pled guilty to the new offense of burglary of a habitation because you are, in fact, guilty of that offense?

The defendant: Yes, sir.

The Court: Have you pled true to the prior conviction because you are, in fact,

one and the same person as previously convicted in that case?

The defendant: Yes, sir.

The Court: Do you have any complaints about the way your attorney has handled the case that you think should be looked at by a court?

The defendant: No, sir. ***" [Stopping at page 9, line 7]

I find that the pleas of the defendant were free and voluntary. Defendant[']s present assertions to the contrary are without merit.

2. I next consider petitioners Grounds Two and Four:

(A) Claim that *petitioner was denied due process because he was not afforded a neutral and detached officer (i.e. judge) at his revocation (adjudication) hearing on November 6, 1995, in that the trial judge failed to honor the agreement between the district attorney and defense counsel and was biased against petitioner.*

The issue of being deprived of his due process right to a neutral and detached magistrate at the adjudication and sentencing hearing was raised by Jimenez as point one in the pro se brief he filed on the second appeal (Attachment 22). Finding no basis for concluding that the trial court denied due process point one was overruled.

(1) Any contention that would not entitle the applicant to relief on direct appeal, or that already has been raised and rejected on direct appeal will not be recognized for habeas relief from the Court of Criminal Appeals [*EX PARTE TWYMAN*, 716 S.W.2d 951, 952-3 (Tex. Crim. App. 1986); *EX PARTE ACOSTA*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984); EX PARTE SCHUESSLER, 846 S.W.2d 850, 852 (Tex. Crim. App. 1993)].

(2) Any contention that could have been raised on direct appeal, but was not raised is not cognizable for habeas relief. *EX PARTE KIRBY*, 492 S.W.2d 579 (Tex. Crim. App. 1973), *CONALLY V. STATE*, 492 S.W.2d 578 (Tex. Crim. App. 1973).

Under the authorities quoted above this claim would not now be cognizable for habeas relief, but there are other reasons why the defendant fails to establish that he is entitled to relief.

Reference is made to the affidavit of Louis Perez where he makes the following factual statement:

> "On November 6, 1995, the Motion to Revoke Deferred Adjudication hearing took place before Judge John E. Sutton. There was no actual plea bargain because Carlos Jimenez would not and could not in good conscience plea (sic) to the allegations that he insisted were not true."

I find this statement to be correct. The reporter's transcript (not appended to this order) shows in Vol. 3 page 16, line 22 the following:

> "The Court: Is there any plea agreement in connection with this case?"

The response to the question was made by Evan Jones, Assistant District Attorney:

> "Mr. Jones: None, Your Honor."

I find that there was no plea bargain.

The reporter's record further shows that at the hearing of November 6, 1995, the defendant Carlos Jimenez got started on the wrong foot by telling Judge Sutton who presided that when Jimenez was in court in 1991 he knew "it was a deferred" but he really didn't understand what it was. From that point on the judge did everything by the book to the point where he ordered the motion to revoke read without asking if the parties were willing to waive the reading.

This attitude by the trial judge – which Jimenez defines as bias – finds its origin in what occurred during the hearing. The kind of bias which is necessary for the recusal of a judge must be *extra-judicial*. I quote from *GRIDER V. BOSTON, CO., INC.*, 773 S.W.2d 338, 346 (Tex.App.—Dallas 1989):

> " *** [6] By points eight and nine, Plaintiffs assert that the trial judge erred in failing to recuse himself, and that the judge to whom

the motion for recusal was transferred erred in failing to require the recusal of the trial judge. The rule governing recusal states:

> Judges shall recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. TEX.R.CIV.P. 18b(2). As grounds for recusal, Plaintiffs contend that the trial judge exhibited an antagonistic attitude toward them and that his rulings were consistently unfair. We do not intimate that the trial court conducted itself in this fashion. Even so, Plaintiffs' remedy was not a motion to recuse; the proper remedy was to assign error on the basis of the adverse rulings. *To require recusal, a judge's bias must be extrajudicial and not based upon in-court rulings.* >United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). Plaintiffs' motion properly failed because it contained no allegations of personal bias from an extrajudicial source. In addition, Plaintiffs did not file the statement of facts from the recusal hearing, providing no record on appeal that might enable us to weigh the evidence leading to the denial of the motion. As a result, Plaintiffs have preserved no error; we have nothing to review. Evans v.

> Hoag, 711 S.W.2d 744, 746 (Tex.App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.). We overrule points nine and ten.***"

I find from an examination of the record that the alleged bias of the trial judge in this case was not extrajudicial. It therefore could not form any basis to question or affect his status to hear the State's motion to adjudicate and to impose sentence.

I find this ground to be completely without merit.

(B) Claim of *ineffective assistance of counsel by Louis Perez, who allegedly induced petitioner to plead true to probation violations at the time of the adjudication hearing on November 6, 1995 with the representation that petitioner would receive at most 15 years in the penitentiary.*

Louis Perez in his affidavit (Attachment 19) does not specifically respond to this allegation, but implies that whatever took place was done as a trial strategy, and that the possible consequences of such strategy were fully explained to Jimenez.

For purposes of this order I am assuming that the two pleas of "true" were entered as part of the trial strategy pursued by attorney Perez. In examining the court reporter's transcript I find that the defendant entered a plea of "true" to paragraphs 2 and 4 (Vol. 3 page 14). Commencing at page 15, line 7 the record shows the following:

"The Court: You may be seated. Mr. Jimenez, based upon a plea of true to Paragraphs Two and Four, that plea of true is all I have to have in order to find those allegations to be true. Do you understand that, sir?

The defendant: Yes, sir.

The Court: And by pleading true to those, while the State can still present evidence to prove them, the State no longer has to present evidence to prove them. In other words, they don't have to prove any allegations on the Motion to Revoke that you say are true; do you understand that?

The defendant: Yes, sir.

The Court: Mr. Jimenez, do you understand that I do not have to find all the allegations on the Motion to Revoke true in order to revoke a probation. I can revoke a probation if I find any of the allegations to be true; do you understand that?

The defendant: Yes, sir.

The Court: So your plea of true to Paragraph Two and your plea of true to Paragraph Four, that is legally all

I have to have in order to revoke your probation; do you understand it?

The defendant: Yes, Your Honor.

The Court: And that by pleading that way, the State doesn't have to come in here and prove anything. That's all I have to have to revoke your probation; do you understand?

The defendant: Yes, sir.

The Court: Do you understand the consequences of continuing with a plea of true to those paragraphs?

The defendant: Yes, sir

The Court: And are you wanting to continue to plead true to those paragraphs, knowing that that is all I have to have to revoke your probation?

The defendant: Yes, sir.

The Court: Is there any plea agreement in connection with this case?

Mr. Jones: None, Your Honor. ***" [Stopping page 16, line 24]

I find that regardless of the initial reasons for Jimenez entering a plea of true to Paragraphs Two and Four, the trial judge gave him an opportunity to state that he did not want to continue with such pleas of true. I further find that defendant's decision to continue with the pleas of true was strictly his and had nothing to do with any suggestion – strategy or otherwise – originating with trial counsel Louis Perez.

I finally find that the matter of *15 years in the penitentiary* was never a representation or promise made to Jimenez, but was made merely as a statement of what the recommendation of the prosecutor and the community supervision officer would be.

I find that the prosecutor expressed the opinion that "we believe that this is a fifteen-year case" (Vol 3, reporters' transcript page 116) and that trial counsel, Louis Perez stated "We would ask the Court to follow their recommendation" (Vol 3, reporter's transcript page 117). The trial judge, after setting our his reasons (to which the appellate opinion made reference in Attachment 22) chose to not follow the recommendations and set punishment at 43 years confinement in the Institutional Division.

I find that there is no evidence in the record or otherwise that any representation was ever made to Jimenez that he would at most receive 15 years in the penitentiary. This ground is without merit.

(C) The final claim is one of *ineffective assistance of counsel by Louis Perez, who failed to object to and request the disqualification of the trial Judge John E.*

Sutton to preside because of the judge's bias, prejudice and vindictiveness at the time of the adjudication hearing on November 6, 1995.

Reference is made to the discussion of claim (A), supra, and the trial court's finding that the alleged bias of the trial judge in this case was not extrajudicial and therefore could not form any basis to question or affect Judge Sutton's status to hear the State's motion to adjudicate and to impose sentence. Any objections by Lewis Perez along the lines suggested by Jimenez would have been useless, improper, irritating to the trial judge and not in the best interest of the defendant. I find no merit to this claim.

6. RECOMMENDATION OF THE TRIAL COURT ON PETITIONER'S CONTENTIONS: I find that no useful purpose could be accomplished by an evidentiary hearing. I recommend that the Court of Criminal Appeals deny the application in its entirety.

* * *

SIGNED this day of April 20, 2005
Curt F. Steib
Senior District Judge Presiding

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CARLOS JIMENEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	6:05-CV-052-C
NATHANIEL	)	
QUARTERMAN,[1]	)	
Director Texas	)	
Department of Criminal	)	
Justice, Correctional	)	
Institutions Division,	)	
	)	
Respondent.	)	

ORDER

Petitioner Carlos Jimenez, acting pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on July 22, 2005. Respondent filed an Answer with Brief in Support on October 3, 2005, and provided copies of Petitioner's relevant state court records. Petitioner

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[1] Nathaniel Quarterman has been named Director of the Texas Department of Criminal Justice, Correctional Institutions Division, and the caption is being changed pursuant to Fed. R. Civ. P. 25(d).

subsequently filed his objections and response on December 5, 2005.

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 119th Judicial District Court of Tom Green County, Texas, in cause number CR91-0528-B, styled *The State of Texas v. Carlos Jimenez*. In that cause number, Petitioner was charged with the felony offense of burglary of a habitation, and one prior felony conviction for aggravated assault with a deadly weapon was alleged to enhance the sentence. Pursuant to a plea agreement, Petitioner pleaded guilty to the charge and true to the enhancement paragraph; and on November 12, 1991, the trial court deferred adjudication and placed him on probation for five years. On December 3, 1991, the trial court entered an Amended Judgment to add the monthly probation fee that had been announced in open court at the sentencing. Petitioner did not appeal.

On March 3, 1995, the prosecution filed a Motion to Revoke Deferred Adjudication, Probation, and to Proceed to Adjudicate Guilt, which alleged that he had violated three terms and conditions of his deferred adjudication probation. A State's First Amended Motion to Revoke Deferred Adjudication, Probation, and to Proceed to Adjudicate Guilt, which alleged four violations of the terms and conditions of probation, was filed on October 3, 1995. Following a hearing on the motion to revoke on November 6, 1995, the trial court found that Petitioner had violated all four terms and conditions of his probation as alleged in the First Amended Motion to Revoke, adjudicated guilt, and sentenced him to forty-three (43) years'

incarceration in the Texas Department of Criminal Justice. A Motion for New Trial was filed on December 4, 1995, and the trial court appointed counsel to represent Petitioner on appeal on December 8, 1995. The appointed counsel filed a Notice of Appeal on January 24, 1996. On July 15, 1996, appellate counsel filed an *Anders*[2] brief in the Third Court of Appeals and alleged that, in his professional opinion and after a diligent review of the record, Petitioner had no grounds for an appeal. In a *per curiam* unpublished opinion filed on September 11, 1996, the Third Court of Appeals held that Petitioner's appellate brief was frivolous because the notice did not raise the question of jurisdiction and dismissed the appeal (No. 03-96-00123-CR). Petitioner did not file a petition for discretionary review.

On April 11, 2002, Petitioner filed a state habeas application and argued that he had been denied the right to file an appeal because his attorney had not properly notified him that he was filing an *Anders* brief. In an opinion delivered on September 25, 2002, the Texas Court of Criminal Appeals granted

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[2] In *Anders v. California*, 386 U.S. 738 (1967), the Supreme Court of the United States determined that "when [appellate] counsel finds a case to be wholly frivolous, after conscientious examination of it, he should so advise the court and request permission to withdraw." *Id.* at 744. The Court further noted that such request must be accompanied by a brief that refers to anything that might arguably support an appeal and a copy of the brief should be provided to the indigent defendant "and time allowed him to raise any points that he chooses . . . ." *Id.* Thus, an "*Anders* brief" refers to the request to withdraw and accompanying brief that sets out anything that might arguably support an appeal.

Petitioner permission to file an out-of-time appeal (App. No. 53, 212-01).

On October 25, 2002, Petitioner filed a notice of appeal pursuant to the order granting him permission to file an out-of-time appeal.[3] In an unpublished Memorandum Opinion filed May 15, 1993, the Third Court of Appeals affirmed Petitioner's conviction and sentence (No. 03-02-00733-CR). Although Petitioner filed a *pro se* petition for discretionary review, the Texas Court of Criminal Appeals refused the petition on October 8, 2003.

Petitioner filed a second state application for writ of habeas corpus on December 6, 2004. The Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing on June 29, 2005 (App. No. 53-212-02).

Because Petitioner declared under penalty of perjury that he delivered the instant petition to prison officials for mailing to the court on July 19, 2005, the petition is deemed to be filed as of July 19, 2005. *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (holding that for purposes of determining the applicability of the AEDPA, a federal petition is considered filed on the date it is delivered to prison officials for mailing to the district court).

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[3] Petitioner's appointed attorney also filed an *Anders* brief in the out-of-time appeal and alleged that he could find no grounds for an appeal and any appeal was frivolous and meritless.

The Court understands Petitioner to raise the following grounds for review in the instant petition:

(1) He was denied due process at the hearing on the motion to adjudicate and revoke his probation because the judge was biased and had pre-determined his sentence.

(2) He was denied due process because the sentencing judge threatened him with perjury, called him a liar, interrupted Petitioner, denied Petitioner the right to explain why he did not understand his previous plea of guilty, and refused to consider the fifteen-year sentencing agreement between Petitioner and the prosecutor.

(3) His conviction was unlawfully obtained because his plea of guilty was coerced, involuntary, and unintelligent.

(4) He was denied effective assistance of counsel at the plea proceeding because counsel failed to adequately explain deferred adjudication or the use of a prior conviction as a sentencing enhancement.

(5) He was denied effective assistance of counsel at the revocation proceeding because counsel did not advise the court that Petitioner had agreed to a fifteen-year sentence, counsel failed to object to the sentencing judge's bias, prejudice, and vindictiveness, counsel was intimidated by the sentencing judge, and he failed to explain to Petitioner that he had to plead true to all allegations in the motion to adjudicate to be eligible to receive a fifteen-year sentence.

Respondent argues that Petitioner has failed to timely file his § 2254 petition.

STATUTE OF LIMITATIONS

Petitioner filed his federal petition after April 24, 1996; therefore, his petition is subject to review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA, signed into law on April 24, 1996, enacted the present 28 U.S.C. § 2244(d), which establishes a one-year limitation on filing federal habeas corpus petitions. Sub-section (d) now provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented

> from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Under the statute, the habeas clock begins to run when one of the circumstances included in § 2244(d)(1)(A)-(D) triggers the Act's application.

Petitioner first argues that his petition is not time-barred because the statute of limitations did not begin to run in his case under 28 U.S.C. §

2244(d)(1)(A) until January 8, 2004, because the out-of-time appeal "reset" the one-year period; the conclusion of his "direct appeal" included the periods for filing a petition for discretionary review and a petition for writ of certiorari; and his state habeas applications tolled the limitations period. He does not argue that the one-year limitations period was triggered by the circumstances listed in Sections 2244(d)(1)(B), (C), or (D). Respondent agrees that the applicable section is § 2244(d)(1)(A) but disagrees with Petitioner's tolling arguments and contends that the instant petition is time-barred.

Petitioner raises claims relating both to (1) his initial plea of guilty and deferred adjudication community supervision sentence and (2) the revocation of his deferred adjudication community supervision. Even though Petitioner does not distinguish between the two groups of claims in his limitations argument, this Court will analyze each group separately because each group of claims became "final" for purposes of the AEDPA's limitations period on different dates. *See Dones v. Dretke*, No. 3:05-CV-2237-M, 2006 WL 1294077, at *2 (N.D. Tex. May 11, 2006) (separating claims challenging an order deferring adjudication and imposing community supervision from a claim challenging an order revoking community supervision and imposing a prison sentence for purposes of calculating the one-year limitations period).

1. Claims Regarding Petitioner's Plea of Guilty and Placement on Deferred Adjudication Community Supervision

On November 12, 1991, Petitioner pleaded guilty and the trial court deferred adjudication and entered an order for five years of community supervision. The trial court entered an Amended Judgment on December 3, 1991. Petitioner did not file an appeal.

Under Section 2244(d)(1)(A), the AEDPA's one-year limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003). The one-year period begins to run under § 2244(d)(1)(A) when the judgment of conviction becomes final, "not when the petitioner becomes aware that the judgment is final." *Crutcher v. Cockrell*, 301 F.3d 656, 657 (5th Cir. 2002). Furthermore, the "AEDPA, not state law, determines when a judgment is final for federal habeas purposes." *Foreman v. Dretke*, 383 F.3d 336, 339 (5th Cir. 2004) (citing *Roberts v. Cockrell*, 319 F.3d at 694).

"Although an order of deferred adjudication is not a judgment under Texas law, it is a judgment under the relevant federal law." *Caldwell v. Dretke*, 429 F.3d 521, 527 (5th Cir. 2005), *cert. denied*, *Caldwell v. Quarterman*, (No. 05-10671) 549 U.S. _____ (October 10, 2006). "Because an order of deferred adjudication community supervision is a final judgment within the plain meaning of AEDPA section 2254, the one-year statute of limitations, for challenging substantive issues of the orders of deferred adjudication, beg[ins] to run when the order deferring adjudication bec[omes] final." *Id.* Petitioner did not file an appeal following his plea of guilty; therefore, his

conviction became final by expiration of the time for filing a direct appeal from the order deferring adjudication on December 12, 1991. Tex. R. App. P. 41(b)(1) (1990), now Tex. R. App. P. 26.2(a)(1) stating that a defendant convicted in Texas must file his notice of appeal within 30 days after the trial court imposes or suspends the sentence in open court). *See Scott v. Johnson*, 227 F.3d 260, 262 (5th Cir. 2000) (holding that when a Texas petitioner does not appeal his conviction, it becomes final thirty days after his plea of guilty); *Roberts v. Cockrell*, 319 F.3d at 694 ("If the defendant stops the appeal process before [filing a petition for writ of certiorari], the conviction becomes final when the time for seeking further direct review in the state court expires."). *See also Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999) (holding that a defendant placed on deferred adjudication community supervision must raise issues relating to the original plea proceeding in an appeal taken when the community supervision is first imposed and not after subsequent revocation proceedings). Hence, Petitioner's plea of guilty and five-year sentence to deferred adjudication community supervision became final for purposes of the AEDPA's limitations period on December 12, 1992, and the one-year limitations period literally expired on December 12, 1993.

Nevertheless, for federal petitions filed after the enactment of the AEDPA on April 24, 1996, which attack convictions that became final thereto, the United States Court of Appeals for the Fifth Circuit has determined that an inmate must be accorded a one-year "grace period" within which to file his federal

petition; that is, the petitioner must file his federal petition on or before April 24, 1997. *Felder v. Johnson*, 204 F.3d 168, 169 (5th Cir. 2000). Petitioner, however, did not file his petition until July 19, 2005, over eight years after the applicable limitations period had expired. Therefore, unless Petitioner demonstrates that he is entitled to statutory or equitable tolling of the limitations period, his claims regarding the original guilty plea and order for deferred adjudication community supervision are time-barred.

Section 2244(d)(2) provides for tolling of the limitation period during the time when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.["] "Congress meant to include within the scope of § 2244(d)(2) those 'properly filed' applications, without respect to state nomenclature or the nature of the petitioner's state confinement, that, pursuant to the wording of § 2244(d)(2), seek 'review' of the 'pertinent judgment or claim.'" *Moore v. Cain*, 298 F.3d 361, 366-67 (5th Cir. 2002). "[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (emphasis in original).

Although Petitioner properly filed two state habeas applications, on April 11, 2002, and December 6, 2004, he is not entitled to tolling under 28 U.S.C. § 2244(d)(2) because neither application was filed before the limitations period expired on April 24, 1997. *See Scott v. Johnson*, 227 F.3d at 263 (holding that a state application filed after the one-year limitation period

had expired did not toll the limitation period under § 2244(d)(2)).

Petitioner also argues that he is entitled to equitable tolling of the limitations period because the limitations period is not a jurisdictional bar, he was deprived of his first appeal because of ineffective assistance of counsel, and he is indigent, incarcerated, Hispanic, and proceeding *pro se*. Equitable tolling is a discretionary doctrine "that turns on the facts and circumstances of [each] particular case, . . . and does not lend itself to bright-line rules." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). "The doctrine . . . is applied restrictively and . . . is entertained only in cases presenting 'rare and exceptional circumstances where it is necessary to preserve a plaintiff's claims when strict application of the statute of limitations would be inequitable.'" *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (quoting *Fierro v. Cockrell*, 294 F.3d 674, 682 (5th Cir. 2002) (internal quotation and alteration omitted)). The doctrine applies principally "where the [petitioner] is actively misled by the [respondent] about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (internal quotation marks omitted) (emphasis added). *See In re Wilson*, 442 F.3d at 875 ("A petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify."). The doctrine does not apply "where a petitioner has failed to pursue habeas relief diligently." *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002). Therefore, a court must examine each case on its individual facts and, guided

by precedent, "determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling." *Fisher v. Johnson*, 174 F.3d at 713 (footnote omitted).

Attorney error or neglect is insufficient to warrant equitable tolling. *Cousin v. Lensing*, 310 F.3d at 849. *See United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) ("Ineffective assistance of counsel does not constitute a basis for equitable tolling."); *Moore v. Cockrell*, 313 F.3d 880 (5th Cir. 2002) (holding that counsel's delay in notifying petitioner of the result of a direct appeal does not constitute a basis for equitable tolling); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002) (holding that "counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [petitioner's] habeas petition in the district court within the one-year limitations period"); and *Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (holding that "ineffective assistance on direct appeal in state court is not relevant to the question of tolling the AEDPA's statute of limitations").

Petitioner's allegations of indigence, incarceration, *pro se* status, and limited education are likewise insufficient to justify equitably tolling the limitations period. *See Turner v. Johnson*, 177 F.3d at 391 (providing that unfamiliarity with legal process, ignorance of the law, or lack of legal training does not merit equitable tolling); *Felder v. Johnson*, 204 F.3d at 171-72 (finding that ignorance of the law, lack of knowledge of filing deadlines, a prisoner's *pro se* status, lack of access to federal statutes and case law, incarceration prior to enactment of the AEDPA,

illiteracy, deafness, a lack of legal training, and actual innocence claims will not support equitable tolling of the AEDPA's statute of limitations).

Moreover, the doctrine of equitable tolling "will not be applied where the [petitioner] failed to diligently pursue habeas corpus relief under § 2254." *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). Petitioner has provided no evidence that he was prevented by the State of Texas from timely raising his claims or that any "rare and exceptional" circumstances warrant equitable tolling of his claims from April 24, 1997, when the one-year period expired, until July 19, 2005, when he is deemed to have filed his petition. *See Phillips v. Donnelly*, 216 F.3d at 511 (holding that the burden of proving facts to support a claim of equitable tolling lies with the party seeking equitable tolling).

Accordingly, Petitioner's claims regarding his plea of guilty and the imposition of five years' deferred adjudication community supervision are time-barred under 28 U.S.C. § 2254(d)(1)(A).[4]

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[4]To the extent that Petitioner argues that he could not appeal from his plea of guilty and the imposition of five years' deferred adjudication community supervision in 1991 until after his community supervision was revoked and sentence imposed in 1995, his claims are still time-barred as discussed in the following section. *See Manuel v. State*, 994 S.W.2d at 661-62 (noting in 1999 that prior to 1987, when Texas Code of Criminal Procedure Art. 44.01(j) was enacted, a defendant placed on deferred adjudication community supervision could challenge the decision to defer adjudication or its terms and conditions only by moving for final adjudication and then appealing the adjudication, but the 1987 change in the law required a defendant placed on deferred

2. Claims Regarding the Revocation of Deferred Adjudication Community Supervision

On November 6, 1995, the trial court held a hearing, adjudicated guilt, and sentenced Petitioner to 43 years' incarceration. Counsel for Petitioner filed a motion for new trial and notice of appeal. The Third Court of Appeals dismissed the appeal for want of jurisdiction on September 11, 1996, and Petitioner did not file a petition for discretionary review. Petitioner's claims regarding the revocation of his community supervision and 43-year sentence therefore became final on October 11, 1996, when his time for filing a petition for discretionary review expired, and he had to file his federal petition on or before October 11, 1997.

Petitioner, however, argues that because he was granted permission to file an out-of-time appeal pursuant to his first state writ application, his conviction became final for limitations purposes at the conclusion of the out-of-time appeal process, that is, on January 6, 2004, when his time expired for filing a petition for writ of certiorari.[5] Although he argues that

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adjudication community supervision to raise issues relating to the original plea proceeding only in an appeal taken when the deferred adjudication community supervision was first imposed).

[5] Following the revocation of his deferred adjudication community supervision and sentencing to 43 years' incarceration, Petitioner's appointed counsel filed a notice of appeal and subsequently an *Anders* brief. The Third Court of Appeals dismissed the appeal on September 11, 1996, and Petitioner did not file a petition for discretionary review. Five years later, on April 11, 2002, Petitioner filed a state application for writ of habeas corpus and alleged that he had been denied the right to appeal because his

the decision by the Fourth Circuit Court of Appeals in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005), supports his argument, he has overlooked the decision by the Fifth Circuit Court of Appeals in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004),[6] which is binding on this Court.

In *Salinas*, the Fifth Circuit determined that "[o]n its face, AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between." *Id.* at 429. "As a result, when a petitioner convicted in the Texas system acquires the right to file an 'out-of-time' PDR, the relief tolls the

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counsel had not properly notified him that he was filing an *Anders* brief so Petitioner could file his own *pro se* brief. On September 25, 2002, the Texas Court of Criminal Appeals granted Petitioner permission to file an out-of-time appeal. Petitioner contends that this granting of an out-of-time appeal "restored" him to the position he was originally in immediately after the revocation of his deferred adjudication community supervision on November 6, 1995. He then argues that his revocation actually became final for purposes of the AEDPA's limitations period on January 6, 2004, when his time expired for filing a petition for writ of certiorari following the out-of-time appeal. Petitioner also argues that because he filed his second state application on December 6, 2004, the limitations period was tolled until it was denied on June 29, 2005, and his federal petition was therefore timely filed on July 19, 2005.

[6] In *Frasch v. Peguese*, 414 F.3d 518, 522-23 (4th Cir. 2005), the Fourth Circuit Court of Appeals rejected the Fifth Circuit's approach in *Salinas* because "it ignore[d] that two separate proceedings [were] involved"; that is, even though Frasch obtained the right to file an out-of-time appeal in a collateral proceeding, that proceeding ended with the order granting him leave to file the out-of-time appeal, which placed him in the same procedural posture as if he had timely filed his direct appeal.

AEDPA's statute of limitations until the date on which the Court of Criminal Appeals declines to grant further relief, but it does not require a federal court to restart the running of AEDPA's limitations period altogether." *Id.* at 430 (footnote omitted). Thus, "if . . . an 'out-of-time' PDR is awarded only as a result of the collateral review process, limitations is tolled merely while the petitioner seeks to obtain that relief." *Id.* at 430. Although the decision in *Salinas* involved an out-of-time petition for discretionary review, its holding is equally applicable to an out-of-time appeal that "is necessarily the product of state habeas review . . . ." *Id.* at 431. *See Roach v. Quarterman*, No. 3:05-CV-2539-P, 2006 WL 2586087 at *2 n.5 (N.D. Tex. Sept. 8, 2006) (noting that the decision in *Salinas* is equally applicable to cases involving out-of-time PDRs or direct appeals obtained by state collateral review). Thus, for purposes of the AEDPA's statute of limitations, the revocation of Petitioner's deferred adjudication community supervision became final on October 11, 1996, when his time for seeking direct review expired, and the granting of permission to file an out-of-time appeal did not "restart" the limitations period. The one-year limitations period expired on October 11, 1997, and the instant petition is clearly time-barred unless Petitioner demonstrates that he is entitled to statutory or equitable tolling.

Petitioner is not entitled to statutory tolling under § 2244(d)(2) because he filed both of his state habeas applications after the one-year limitations period expired. *Scott v. Johnson*, 227 F.3d at 263.

Petitioner is not entitled to tolling for the time period during which his first state habeas application

and the resulting out-of-time appeal were pending because neither was filed before the one-year limitations period expired. *See Miles v. Dretke*, No. 3:03-CV-2725-K, 2004 WL 1041635 (N.D. Tex. May 5, 2004) (adopting the findings and conclusions of the magistrate judge, 2004 WL 827941 at *3 (N.D. Tex. April 15, 2004)) (finding that when the state habeas application that seeks permission to file an out-of-time PDR is filed after the one-year limitation period has expired, neither the state habeas application nor the out-of-time PDR will toll the limitation period). *See also Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) ("A state court's subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application.").

As previously discussed, Petitioner's claims of indigency, incarceration, *pro se* status, limited education, and limited ability to speak English are insufficient to warrant equitable tolling. Moreover, he has not demonstrated that he diligently pursued relief in either state or federal court. *Melancon v. Kaylo*, 259 F.3d at 408. Petitioner was originally placed on deferred adjudication community supervision on November 12, 1991, and his community supervision was revoked on November 6, 1995, but he did not file his first state habeas application until April 11, 2002, over six years later. Furthermore, after Petitioner's discretionary review was refused on October 8, 2003, following his out-of-time appeal, he did not file another state habeas application until December 6, 2004, over one year later. *See Coleman v. Johnson*, 184 F.3d at 403 (holding that a petitioner was not entitled to

equitable tolling where he did not explain the six-month delay between receiving notice of the denial of his state appeal and filing his federal petition). Petitioner has provided no explanation for these lengthy delays and none is apparent from the record. "Equity is not intended for those who sleep on their rights." quoting *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999).

CONCLUSION

Accordingly, the Court finds that the above-styled and -numbered case should be DISMISSED with prejudice pursuant to 28 U.S.C. § 2244(d)(1). All relief not expressly granted is denied and any pending motions are hereby denied.

SO ORDERED.

Dated October 23, 2006.

SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

CARLOS JIMENEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	6:05-CV-052-C
NATHANIEL	)	
QUARTERMAN,	)	USCA # _____
Director, Texas	)	
Department of Criminal	)	
Justice, Correctional	)	
Institutions Division,	)	
	)	
Respondent.	)	

CERTIFICATE AS TO APPEALABILITY AND ORDER

On November 6, 2006, Petitioner filed a Notice of Appeal and Application to Proceed *in Forma Pauperis* in the captioned action in which the District Court has entered a final order in a proceeding pursuant to 28 U.S.C. § 2254. The Court shall construe Petitioner's notice of appeal as a request for a certificate of appealability. *See United States v. Orozco*, 103 F.3d 389, 392 (5th Cir. 1996) (providing that a notice of appeal by a *pro se* petitioner may be

construed as a request for a certificate of appealability).

Pursuant to Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c)(3), the Court finds that:

(1) The party appealing should be GRANTED leave to proceed *in forma pauperis* on appeal.

(2) A Certificate of Appealability should be DENIED. For the reasons stated in the Memorandum Opinion and Judgment entered by the District Court on October 23, 2006, the Petitioner has failed to make a "substantial showing of the denial of a constitutional right." *Dowthitt v. Johnson*, 230 F.3d 733, 740 (5th Cir. 2000), quoting 28 U.S.C. § 2253(c)(2). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (finding that a certificate of appealability should be denied when a petitioner fails to show that either "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and such jurists "would find it debatable whether the district court was correct in its procedural ruling").

SO ORDERED
Dated November 22, 2006

SAM R. CUMMINGS
United States District Judge

APPENDIX L

NO. 06-11240

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CARLOS JIMENEZ,
Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONAL DIVISION,
Respondent,

Petition for Certificate of Appealability from the
United States District Court
for the Northern District of Texas, San Angelo
Division

PETITION FOR CERTIFICATE OF APPEALABILITY
WITH BRIEF IN SUPPORT

Carlos Jimenez
Petitioner Indigent Pro se
Telford Unit
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NO. 05-11240

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CARLOS JIMENEZ, Petitioner,	)	
v.	)	USDC CIV. ACTION NO.
	)	6:05-CV-052-C
NATHANIEL QUARTERMAN, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent.	)	

PETITION FOR CERTIFICATE OF APPEALABILITY
WITH BRIEF IN SUPPORT

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES, Carlos Jimenez, Petitioner in the above styled and numbered cause and filed this hi Petition for Certificate of Appealability with Brief in Support for the Dismissal of his Federal Habeas 28 U.S.C. § 2254 as time barred pursuant to 28 U.S.C. § 2244(d)(1) and the denial of a Certificate of Appealability in the U.S. District Court by Order on

November 22, 2006 and seeks to appeal these decisions.

I.
JURISDICTION

The Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 2241, 2254.

II.
THE SHOWING REQUIRED FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Obtaining a Certificate of Appealability requires a substantial showing of Constitutional error. 28 U.S.C. § 2253(c)(2); Drinkard v. Johnson, 97 F.3d 751, 756 (5th Cir. 1996). This entails "reasonable jurists to find the district court's assessment of the constitutional claims debatable or wrong" or reasonable "reasonable jurists to find it is debatable whether the petition [states] a valid claim of a constitutional right" and such jurists in the instant case "would find it [debatable] whether the district court was correct in it procedural ruling". Slack v. McDaniel, 120 S.Ct. 1595, 1596 (2000); Miller-El v. Cockrell, 123 A.Ct. 1029, 1039 (2003).

III.
THE QUESTIONS AT ISSUE

QUESTION NUMBER ONE:

Whether the district court erred in denying a Certificate of Appealability because the district court was wrong in time barring Petitioner's federal petition because his appeal granted by the highest state court reset the 1-year statute of limitations pursuant to 28 U.S.C. § 2244(d)(1)(A)?

QUESTION NUMBER TWO:

Whether the district court erred in denying a Certificate of Appealability because if in the event Petitioner was statutorily time barred the district court was wrong for not equitably tolling the 1-year statute of limitations in Petitioner's "rare and exceptional circumstances"?

IV.

QUESTION NUMBER ONE RESTATED AND ARGUMENT:

Whether the district court erred in denying a Certificate of Appealability because the district court was wrong in time barring Petitioner's federal petition because his appeal granted by the highest state court reset the 1-year statute of limitations pursuant to 28 U.[S].C. § 2244(d)(1)(A)?

The U.S. District Court for the Northern District of Texas, at San Angelo Division ultimately Dismissed with prejudice petitioner's petition pursuant to 28 U.S.C. § 2244(d)(1). (see Order dated October 23, 2006) Petitioner's Petition was time barred. Later the U.S. District Court after Petitioner had filed Notice of Appeal and Application to proceed

in forma pauperis, denied Petitioner a C.O.A. and Granted Petitioner to proceed in forma pauperis. (see Order dated November 22, 2006)

The district court recognized 5 distinctive grounds claiming Constitutional deprivation. (see Order dated Oct. 23, 2006 at 3-4)

1) Petitioner was deprived of due process at the hearing on Motion to adjudicate and revoke his probation because the judge:

2) (a) was bias and prejudice;
(b) had a predetermined sentence.

On the facts presented to the district court (see Petitioner's Response to Respondent Dretke's Answer with brief in Support at 13A through 20 Petitioner had demonstrated that he was denied a constitutional right namely 6th and 14th Amendment Due Process and if applied to the federal law names Gagnon v. Scarpelli, 93 S.Ct. 1756, 1761 (1973) (Due process requires a neutral and detached hearing officer); and Liteky v. U.S. 114 S.Ct., 1147, 1150 (1994) (a judge can be bias and prjudice [sic] without extra judicial sources from just the hudicial [sic] rulings.) This demonstrates that petitioner made legitimate constitutional claims in his first claim (a) and second (b) and brought facts that if found to be true would demonstrate that it is debateable [sic] to reasonable jurists on merit that petitioner has shown his constitutional claim in this ground to be a valid denial of a constitutional right, and that it is debateable or wrong. Slack v. McDaniel 120 S.Ct. 1595, 1607-08 (2000); Dewittt v. Johnson, 230 F.3d 733, 740 (5th Cir. 2000). In the event

petitioner is not time barred he should receive a C.O.A. on the merits of this claim. Id.

5) Petitioner was deprived his 6th Amendment and 14th Amendment rights to constitutional effective assistance of counsel.

(a) counsel did not advise the court that petitioner had agreed to a 15 year sentence;

(b) counsel failed to object to the sentencing judge's bias, prejudice, and vindictiveness;

(c) counsel was intimidated by the sentencing judge and failed to explain their was a 15 year plea and recusal of the judge;

(d) counsel failed to explain that petitioner had to plea true to all four allegations in the motion to adjudicate in order to have the 15 year plea bargain in effect or that he was mistaken about their even being a 15 year plea bargain.

The sets of facts petitioner presented to the U.S. District Court in claim 5 (see Petitioner's Response to Director Dretke's Answer with brief in support p 27-31 Vii Counsel rendered ineffective assistance of counsel at his revocation hearing (a)(b)(c) identified as claim 5 in U.S. District Court Order dated October 23, 2006 at 4) was a sufficient showing of denial of a constitutional right of 6th and 14th Amendment effective assistance of counsel as articulated in Strickland v. Washington, 104 S.Ct. 2052, 2059-2066 (1984). Counsel was deficient and prejudiced petitioner in that the result would have been a 15 year sentence instead of a 43

year sentence. The facts of this claim if applied to Strickland Id. would be both debateable among reasonable jurists as to the assessment of Petitioner's constitutional claim [and] wrong. Slack v McDaniel 120 S.Ct. 1595, 1604 (2000) (holding that "where a constitutional claim on merits is rejected by the district court the showing required to satisfy § 2253(c) is straight forward: the petitioner must demonstrate that the district court's assessment of the constitutional claims debateable or wrong). If Petitioner is not time barred he should have a C.O.A. issued on the merits or this claim.

Petitioenr [sic] conceeds [sic] that even if he is not time barred Claims number 3) and 4) (see Order dated October 23, 2006 of district at 4) are without merit and should not obtain C.O.A. Pursuant to this Honorable Courts finding in Caldwell v. Dretke 429 F.3d 521 (5th Cir. 2005 Cert. Denied); Caldwell v. Quarterman 127 S.Ct. 431-32 (2006) (holding that defered [sic] adjudication is a final conviction when first entered and a nonliteral [sic] reading of the statute was a closer interpretation of the statute's intent and the narrow reading does not produce injustice).

In the alternative Petitioner asserts that he is not time barred by the AEDPA 28 U.S.C. § 2244(d)(1)(A)-(d)(2) because the new and or out of time appeal reset the 1-year statute of limitations.

Petitioner reasserts that if this Court finds that he is not time barred that he have an opportunity to proceed to the merits of his Claims 1), 2), and 5) on C.O.A. and or on Appeal because he had shown in the

record that they are both factually sufficient and as applied to the Law constitutional claims and are clearly debatable by reasonable jurists in that the State and U.S. District Court's of these claims are clearly debateable or wrong, even if they did not reach the merits of these claims. (see Respondent Dretke's Answer with brief in support pages 11-17; IV Claim 1; page 30 Claim 4;) (see Petitioner's Response to Dretke's Answer with Brief in Support pages 13A - 21 IV A-B VI pages 26-31); (see Order of U.S. District Court October 23, 2006 pages 3-4 designating these Claims as (1), (2) and (5) pages 11-14) Petitioner would incorporate all of the facts, record citations and authorities into this instant Issue and Issue Two as appropriate and relevant to seeking a C.O.A. on the time bar and or C.O.A. on merits if permissible.

STATUTE OF LIMITATIONS

Petitioner filed his federal habeas corpus July 19, 2005 (see Order of U.S. District Court October 23, 2006 hereafter Order Oct. 23, 2006 at 3) Petitioner filed his petition after April 24, 1996 ("Antiterrorism and Effective Death Penalty Act of 1996 hereafter AEDPA) therefore his petition is subject to the present 28 U.S.C. § 2244(d) which establishes a one-year limitation on filing federal habeas petitions. Sub section (d)(1)(A)-(2) as relevant to this instant issue provides as follows:

> (d)-(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State Court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by direct review or the expiration of the time for seeking such review;
>
> (2) the time during which a properly filed application for State post-conviction or other collatteral [sic] review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In the instant case the Texas Court of Criminal Appeals granted Petitioner a new direct appeal out of time because after filing an Anders Brief pursuant to Anders v. California, 87 S.Ct. 1396 (1967) his direct appeal was dismissed and Duke Hooten his appellate attorney not only did not notify him of the Anders Brief or inform him of his right to a copy of the trial record and execute his pro se brief but lied to the Appellate Court about hand delivering the brief and a letter of instruction to petitioner at Tom Green County Jail on July 12, 1996 when Petitioner could not have possibly been there as he was at John Middleton Unit, of TDCJ-ID at that time. (see Ex parte Jimenez, No 53,212-01 Exhibit #4 p 2 of brief Certificate of Counsel and letter attached dated July 12, 1996 pgs 28-41 habeas record, Exhibit 7 pgs 50 time sheet showing Petitioner was inducted into TDCJ-ID 4-496 almost 3 months before Hooten wrote that Hand Delivered Letter to Petitioner.) Petitioner also wrote letters to Mr. Hooten, the County Clerk and the Appellate Court see Exhibits 1,2,3 and as late as 9-4-97 had not heard anything from anyone about the disposition of his appeal. (see Exhibit 3 habeas record page 27).

The Court of Criminal Appeals in it's [sic] unpublished Opinion delivered September 25, 2002 stated in relevant part. (No. 74,443) "Applicant is ordered returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure, all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. We hold that should Applicant desire to prosecute an appeal, he must take affirmative steps to see that written notice of appeal is given within thirty days after the mandate of this Court has issued." (see Tex. Rules of Appellate Procedure Rule 26.2(1)(a)

From 9-4-97 Petitioner wrote additional letters and tried to get other inmates to help him because being Hispanic and his first language being Spanish and having no or little former [sic] education he was not able to help himself or understand the most basic of legal or factual principles. Around the first part of 1998 I finally received a copy of the brief and the letter etc. (see Exhibit #4 page habeas record p 28-41) Because you cannot stay on a Transfer Facility like Middleton for more than 2 years I was transfered [sic] to an ID Unit, Telford sometime prior to April 4, 1998. Having the brief just prior to that when I arrived at Telford Unit I tried to go to the law library and get some help. They did not have any attorney's down there to help me and the Officers that work in there do not know much themselves or the inmates working in there. I tried to get help from other inmates in there but they wanted either for me to pay them or they told me after looking at my papers that I was probably

already time barred and could only file a state writ, but not a federal writ and there was no time limit on a State writ. I finally got an inmate to help me that was Spanish and very knowledgable [sic] about the law and facts applied to the law. He explained to me that I was time barred before I ever got any information about my appeal in early 1998. He explained that the way Texas law was at that time it was unsettled as to whether you can file for a new appeal on ineffectiveness assistance of counsel and then file a second writ challenging your conviction. The Court of Criminal Appeals on December 17, 1997 in Ex parte Rawlinson 958 S.W.2d 198, 200-01 (Tex Crim App 1997) held that prisoner Rawlinson's challenge of ineffective assistance of counsel because his attorney abandoned him on appeal was a challenge to his conviction thus he was barred as a successive writ by Texas Code of Criminal Procedure Article 11.07 Section 4. The offender said that just 4 months later the Texas Court of Criminal Appeals ruled just the opposite of Ex parte Rawlinson in Ex Parte Evans 954 S.W.2d 643, 647 (Tex Crim App. 1998) (holding that a claim that does not address the validity of the underlying conviction under Art. 11.07 Sect. 1 and is not a challenge to the conviction under Art. 11.07 Section 4 because it does not call into question the validity of the prosecution or the judgment of guilt) The inmate said he would help me for free because he knew I was indigent and as a friend to get a new appeal when he saw my papers and what happened. Because we do not get the cases on the Unit for about 2 to 4 months after they are rendered Wheto, the offender helping me did not discovery Ex parte Evans

till about August or September of 1998. It was after that date that he agreed to help me.

> In 1995 the Texas Court of Criminal Appeals ruled in Ex parte Jarrett 891 S.W.2d 935 (Tex Crim App 1995) (holding that an appellate attorney has a duty to explain the meaning and effect of an appellate court decision, to express professional judgment about possible ground for review, and to discuss advantages of further review. Id. at 940. Despite attaching these duties to appellate counsel the Court of Criminal Appeals reaffirmed it's [sic] duty that a defendant has no constitutional right to counsel for pursuing discretionary review. see Ayala v. State, 644 S.W.2d 526 (Tex Cr. App. 1982) Further although a defendant has no constitutional right to counsel he does have a right to prepare and file a petition for discretionary review. Jarret, 891 S.W.2d at 939. Counsels [sic] duty as set out in Jarret [sic] originates from two sources, Art. 26.04 VACCP, as amended in 1987, and Ex parte Axel, 757 S.W.2d 369 (Tex Cr. App. 1988) The Court extended the discretionary review to part of direct appeal Id. In Ex parte Wilson 956 S.W.2d 25, 27 (Tex Cr. App 1997) the Court of Criminal Appeals made a distinction between discretionary review and appeal of right stating that Jarrett was misplaced on relying on Art. 26.04 and Axle because and petition for discretionary review is not a direct appeal of right and appellant counsel does not attach in the same way. Douglas v California 83 S.CT.

814 (1963) (see Article 44.02 VACCP 1987) The Texas Court of Criminal Appeals ruled that the same right to counsel provided in Axel for direct appeal does not attach in Petition for Discretionary Review and overruled Jarrett only to the extent it held that an appellate attorney has an obligation to inform a defendant of anything other than the fact that his conviction has been affirmed and he can pursue discretionary review on his own. Ex parte Wilson 956 S.W.2d at 27.

In March of 2000 Ex parte Whiteside made a final disposition of Art. 11.07 Section 4 12 S.W.3d 819, 823 (Tex Cr. App 2000) Johnson J. in his concurring opinion stated although it does not seem fair he concurrs [sic] with the majority decision in Ex parte Whiteside Id. at 823. (holding "If the initial application does not challenge the conviction a subsequent application pertaining to the same conviction is not barred by Article 11.07 § 4 (citations omitted) "On the other hand, should the initial application pertaining to the same conviction is barred and will not be addressed on the merits unless it meets one of the conditions set forth in Article 11.07, § 4(a)(1) or (2)); see Ex parte Rieck 44 S.W.3d 510 (Tex Cr. App 2004) (affirming Whiteside)

Petitioner finally believed that he could file a first state writ of habeas procedurally correct although he did not know if the Court would give him relief or what that relief would do to effect his federal habeas if anything as he believed was time barred as of October 11, 1997 after Wheto explained his papers to him. Shortly after Ex parte Whiteside was decided and

Texas law was well settled Wheto was transfered [sic] off the Unit and I had to find someone else to help me for free. I finally found a Christina man that was good in the law and helped me to file my first state habeas corpus on April 11, 2002 and has been steadily helping me ever since as this court must know I am not executing this myself.

The instant issue should be debateable by reasonable jurists "whether the district court was correct in it's [sic] procedural ruling" Slack v. McDaniel 120 S.Ct. 1595 at 1604 (2000) as their [sic] are at least 4 Circuit Courts of the U.S. Courts of Appeals divided on the issue of "Whether after a new or out of time appeal is granted by the State's Highest Court due to no fault of the Appellant himself" does the AEDPA 1-year statute of limitations begin to run after the new appeal or direct review has concluded or the time for filing or seeking such review. (emphasis added) Salinas v. Dretke, 354 F.3d 425 (5th Cir 2004) cert denied, 541 U.S. 1032 (2004) (holding that "the right to out of time PDR does not require federal court to restart the AEDPA limitations period"); Frasch v. Peguese, 414 F.3d 518, 522-23 (4th Cir. 2005) (rejecting the 5th Circuit approach in Salinas pertaining to direct appeal of right because "it did not consider two separate proceedings were involved," that is, even though Frasch obtained the right to file his new appeal in a collateral proceeding, which is the only avenue available in post-conviction, it placed the defendant in the same procedural posture as if he had timely filed his direct appeal and after the 1-year limitations should begin to run pursuant to § 2244(d)(1)(A)-(2); Orange v Calbone, 318 F.3d 1167,

1170-71 (10th Cir. 2003) (holding "if a criminal defendant proves he was denied a part of his statutory direct appeal through no fault of his own, and relief is granted by the highest court of last resort, for the purpose of 28 U.S.C.§ 2244(d)(1)(A) his one year limitations period should begin at the conclusion of his direct review or the time for seeking such review); see also Miller v Collins 305 F.3d 491, 494 (6th Cir. 2002) (revising their finding in Bronough v State of Ohio 235 F.3d 280, 286 (6th Cir. 2000 in opposition, but because case could be decided without overruling Bronough the court declined to rule on issue) These reasonable jurists disagree on almost identical sets of facts as in the instance case and a C.O.A. should issue. Slack v McDaniel Id. 1604.

Petitioner had two professional trained attorney's [sic] that both filed Anders Brief's pursuant to Anders v California, 87 S.Ct. 1396, 1402 (1967) and basically could not find any cognizable or meritorious claims on direct appeal. (No. 03-96-0123-CR Sept 11, 1996; and No. 03-02-00733-CR) Petitioner although against all odds, being uneducated, inable [sic] to understand even the basic principals of law, was able to diligently pursue his direct appeal two state procedurally correct habeas corpus, and his federal habeas after being time barred before he ever became aware of the result of his first appeal of right, and presented 5 cognizable constitutional claims to the U.S. District Court with the help of other inmates, having to rely on them and having nothing to induce their help. (see Order October 23, 2006 at p 3-4 for the 5 claims raised in federal habeas exausted [sic] in state) Petitioner has demonstrated that "reasonable

jurists would find the district courts assessment of Petitioner's constitutional claims debateable or wrong and "a C.O.A. should issue because Petitioner has shown at least, that jurists of reason would find it debateable whether Petitioner states a valid claim of constitutional right and jurists of reason would find it debateable whether the district court was correct in it's [sic] procedural rulings Slack v McDaniel 120 S.Ct. 1595, 1604 (2000); Miller-El v Cockrell 123 S.Ct. 1029, 1040 (2003)

V.

QUESTION NUMBER TWO RESTATED AND ARGUMENT:

Whether the district court erred in denying a Certificate of Appealability because if in the event Petitioner was statutorily time barred the district court was wrong for not equitably tolling the 1-year statute of limitations in Petitioner's "rare and exceptional circumstances"?

Because the 1-year "AEDPA" statute of limitations is not a jurisdictional bar, the statute of limitations can be equitable tolled in "rare and exceptional circumstances. Davis Johnson 158 F.3d 806, 811 (5th Cir. 1998), Cert. denied, 526 U.S. 1074 (1999)

Petitioner was initially deprived of his first appeal of right as an indigent by his appointed attorney Duke Hooten. see Evitts v Lucy 469 U.S. 387, 396 (1985) (6th Amendment right requires effective assistance of counsel during his first appeal of right) Mr. Hooten was not only ineffective but through

affirmative misconduct continued to decieve [sic] Petitioner and the Appellate Court with his lies. (see Ex parte Jimenez No. 53,212-01 Exhibit 4 pg 2 of Appellate Brief Certificate of Counsel and letter attached dated July 12, 1996 pgs 28-41 habeas record, and Exhibit 7 p 50 habeas record, Petitioner's time sheet stating Petitioner was received into TDCJ-ID 4-4-96 a little over 3 months from when Mr. Hooten said he delivered by Hand the brief and letter of instructions at Tom Green County jail to Petitioner) see Irvin v. Dept of Veterans Affairs 498 U.S. 89, 96, 111 S.Ct. 453, 458 112 Led 2d 435 (1990) (stating that court allowed equitable tolling in situations where complaintant [sic] has been reduced or tricked by his adversary's misconduct into allowing the filing deadline to pass); see also Arce v Garcia 400 F.3d 1340, 1349 (11 Cir 2005) (holding that the need for some kind of affirmative misconduct for equitable tolling) There is no question that on the facts of this instant case Mr. Hooten misled and tricked the appelate [sic] court, the District Clerk, and Petitioner by filing an Anders Brief and never even contacting Petitioner at all until he sent in an affidavit claiming to have amnesia about any of his cases. (see Ex parte Jimenez, No. 53,212-01 attachment 15 affidavit by Duke Wooten [sic] record on habeas p 81-82) dated May 21, 2002) Petitioner wrote a letter to Mr. Wooten [sic], and the Appellate Court who stated no record of appeal, and finally the District Clerk (see Exhibits 1, 2, and 3 habeas record 25-27) and only got some of the appellate record in 1998 although it was recorded that something was sent to Tom Green County Jail after Petitioner had already gone to TDCJ-ID 4-496.

Petitioner pursued diligently every avenue he had available to try and find out about his appeal before the 1-year limitations ran out in October of 1997, but to no avail, he was time barred before he ever learned any information about his appeal some time in 1998. Petitioner's circumstances are truly "rare and exceptional" in that it is rare that the Texas Court of Criminal Appeals would even grant a new appeal or that and [sic] indigent, pro-se littigant [sic] could prove that an appellant counsel was constitutionally ineffective in that they can lie and because they have more credability [sic] they would be believed by the court above an inmate. see Ex parte Wilson, 956 S.W.2d 25, 27 (1997)

One such rare and exceptional circumstance was recognized Alexander v Cockrell 294 F.3d 525. In Alexander the Fifth Circuit, citing United States v Patterson 211 F.3d 931, because the court had used language that was misleading to petitioner that could have led him to file a subsequent petition. 294 F.3d at 620. The intentional misleading of counsel and denying Petitioner a meaningful direct appeal is unconscionable misconduct on appellate counsel's part, see U.S. v. Wynn 292 F.3d 226, 229 (5th Cir 2002) (the court found that under certain circumstances of intentional misconduct of counsel, equitable tolling may be warranted) Mr. Hooten not only misled Petitioner that he didn't even have an appeal, but lied to the appellate court. (habeas p 28-41 record)

In Felder v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999), this court held that courts must "examine each case on its own facts to determine whether it presents sufficiently "rare and exceptional circumstances" to

justify tolling. (citations omitted) "Equitable tolling is a discretionary doctrine that turns on the facts and circumstances of [each] particular case and does not lend itself to bright line rules. Id at 713. The doctrine of equitable tolling preserves a plaintiff's claims when the strict application of the statute of limitations would be inequitable. United States v Patterson, 211 F.3d 927, 930 (5th Cir. 2000)

In order for equitable tolling to be applicable, it is necessary that the petitioner have been presented, through no fault of his own, from asserting his claim. see Coleman v. Johnson 184 F.3d 398, 403 (5th Cir. 1999); Cousin v Lensing 310 F.3d 843, 848 (5th Cir. 2002). Petitioner is uneducated, writes and reads poorly, and only speaks English fair. (see Application No. 53,212-02 April 20, 2005 p 45-52 for the pre sentencing report that show petitioner's entire history)

Appellate counsel's inexplicable neglect of Petitioner's rights as well as counsel's own ethical obligations to Petitioner presents similar "rare and exceptional circumstances" beyond Petitioner's control that warrants equitable tolling in the event Petitioner is barred by the strict and harsh application of the AEDPA 1-year limitations period. In light of the actions and inactions of appellate counsel as well as Petitioner's limitations but diligent attempts to obtain knowledge, help, and litigate his issues to finality, it would be inequitable to bar petitioner from presenting his claims on merit and failing to issue a C.O.A. on the question of equitable tolling on the facts of this instant case.

When the district court dismissed the petition on procedural grounds the Unites States Supreme Court held "When the district court denies a habeas on procedural grounds without reaching the prisoner's underlying constitutional claim, a C.O.A. should issue when the prisoner shows, at least that jurists of reason would find it debateable whether the petition states a valid claim of denial of a constitutional right and that jurists would find it debateable whether the district court was correct in its procedural ruling. Slack v McDaniel 120 S.Ct. 1595, 1604 (2000); Miller El v Cockrell 123 S.Ct. 1029, 1040 (2003) If C.O.A. does not issue on the statutory toll in Question at Issue Number One, then at least this Honorable Court should issue a C.O.A. on Equitable tolling. Felder v Johnson 204 F.3d 168, 170-71 (5th Cir 2000)

CONCLUSION

The district court in the instant cause was not only incorrect on its procedural decision to time bar Petitioner pursuant to 28 U.S.C. § 2244(d)(1)(2) but it was debatable by reasonable jurists whether a C.O.A. should issue because Petitioner has demonstrated his Petition presented valid Constitutional claims and debateable issues as to whether he was Statutorily barred by 28 U.S.C. § 2244(d)(1)(A) and or equitable tolling.

To obtain a C.O.A. under 28 U.S.C. § 2253(c), a habeas prisoner must make a substantial showing of a constitutional right, a demonstration that shows jurists could debate whether the petition should have been resolved in a different manner or that issues presented were "adequate to deserve encouragement to

proceed further." Slack v McDaniel 120 S.Ct. 1595, 1604 (2000) (in relevant part)

"The issue becaomes [sic] somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a C.O.A. should issue when the prisoner shows, at least, that jurists of reason would find it debateable whether the district court was correct in it's [sic] procedural ruling." Slack v McDaniel 120 S.Ct. 1595, Id. at 1604.

In Miller-El 123 S.Ct. 1029, 1040 (2003) the United States Supreme Court cautioned that "We do not require petitioner to prove, before the issuance of a C.O.A., that some jurists would grant the petition for habeas corpus. Indeed a claim can be debateable even though every jurist of reason might agree, after C.O.A. has been granted and the case has received full consideration, that petitioner will not prevail." Id. at 1040.

Petitioner has proven not only that the district court was not correct in his procedural rulings, but that he was wrong. Slack v Mc.Daniel 120 S.Ct. 1595, 1604 (2000); Miller-El v. Cockrell 123 S.Ct. 1029, 1040 (2003)

PRAYER

WHEREFORE, Petitioner prays that this Court will issue a Certificate of Appealability on each of the above issues in question and eventually reach the merits of his petition on C.O.A.

Respectfully
submiteed,
Carlos Jimenez
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VERIFICATION

I, Carlos Jimenez, Indigent and Pro se Petitioner, do hereby verify that the above and foregoing Petition for Certificate of Appealability with Brief in Support, the Original and one true and correct as possible carbon copy has been placed in the Telford indigent mailing system on the 11th day of January, 2007 and was addressed to this Court's Clerk, at 600 S. Maestri Place, New Orleans, Louisiana 70130

Signed and executed this day the 11th day of January, 2007

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CERTIFICATE OF SERVICE

I, Carlos Jimenez, Petitioner pro se do hereby certify that a true and as correct as possible carbon copy of the foregoing Petition for Certificate of Appealability with Brief in Support has been served by

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APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-11240
USDC No. 6:05-CV-05

CARLOS JIMENEZ,

Petitioner-Appellant,

versus

NATHANIEL QUARTERMAN,
DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL
INSTITUTIONS DIVISION

Respondent-Appellee.

Appeal from the United State District Court
for the Northern District of Texas

ORDER:

Carlos Jimenez, a Texas prisoner, pleaded guilty of felony burglary of a habitation and admitted an enhancement charge based on a prior felony conviction. the initial judgment of deferred

adjudication was revoked, Jimenez was adjudicated guilty, and he was sentenced to 43 years in prison. The district court dismissed Jimenez's 28 U.S.C. § 2254 petition with prejudice as barred by the one-year statute of limitations. Jimenez now seeks a certificate of appealability ("COA"), arguing (1) that the granting of an out-of-time appeal by the Texas Court of Criminal Appeals started the limitations period running anew and (2) that he is entitled to equitable tolling.

Jimenez has failed to demonstrate that reasonable jurists would debate the correctness of the district court's conclusion that the § 2254 petition is time-barred. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, the request for a COA is DENIED.

JERRY E. SMITH
United States Circuit Judge

PETITIONER'S BRIEF

95

(1)

07-6984

FILED
JUN 17 2008
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CARLOS JIMENEZ,

Petitioner,

v.

NATHANIEL QUARTERMAN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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QUESTION PRESENTED

When a court finds that a defendant lost his right of direct appeal because of a violation of his Sixth Amendment right to effective assistance of counsel, and accordingly reinstates his appeal, does the time to seek federal habeas review run from the conclusion of the reinstated proceedings?

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BRIEF FOR THE PETITIONER

Petitioner Carlos Jimenez respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Fifth Circuit (J.A. 6-9, 126-27) and the district court (J.A. 1-5, 76-96) are unpublished. The relevant orders and opinions of the Texas courts (J.A. 13-28, 43-75) are also unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2007. J.A. 8, 124-25. Petitioner filed a timely petition for a writ of certiorari on August 21, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244(d) of Title 28 of the United States Code provides in relevant part:

> **(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> > **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > **(B)** the date on which the impediment to filing an application created by State

action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT

I. Introduction

Federal law requires that before seeking federal habeas relief, a state prisoner must exhaust his available state remedies. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); 28 U.S.C. § 2254(b). To accommodate that requirement, while at the same time encouraging prompt resolution of federal habeas claims, Congress has provided that individuals challenging state convictions must file their federal habeas petitions within one year of the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The limitations period is stayed during the pendency of state court collateral proceedings. *Id.* § 2244(d)(2) .

Ordinarily, the expiration of the time for seeking an appeal marks the end of the direct review process and establishes the finality of a criminal judgment. *See, e.g., Clay v. United States*, 537 U.S. 522, 527 (2003). However, in some cases, "the actions of a party or a lower court suspend the finality of a judgment and thereby reset" the time for seeking further review. *Limtiaco v. Camacho*, 127 S. Ct. 1413, 1418 (2007). For example, both the Texas and Federal Rules of Appellate Procedure allow courts to extend or reopen the time for filing a notice of appeal within a certain time period, even after the initial deadline has passed. Tex. R. App. P. 26.3; Fed. R. App. P. 4(a)(6). It appears undisputed that in such cases, the defendant's conviction is not considered "final" for any purpose – including for purposes of the

federal habeas limitations period – until review of the reinstated appeal has run its course.

Following a practice approved by this Court, *see, e.g.*, *Rodriquez v. United States*, 395 U.S. 327, 328 (1969), state and federal courts also reinstate direct appeals when a defendant lost his right of appeal because of the constitutionally deficient representation of his court-appointed counsel.[1] While the modes and time limits for seeking such reinstatement may vary from those established by rules like Fed. R. App. P. 4(a)(6) and Tex. R. App. P. 26.3, the result is the same: an appeal that is in all respects indistinguishable from the direct appeal to which the defendant was entitled, but lost due to the violation of his constitutional rights.

Without questioning that other kinds of reinstated appeals constitute "direct review" for purposes of Section 2244(d)(1)(A), the Fifth Circuit has held that appeals reinstated by Texas courts as a remedy for the violation of a defendant's right to effective assistance of counsel do not. That holding has no basis in the text of the statute and contravenes the principles of comity and federalism Congress intended Section 2244(d)(1)(A) to foster.

---

[1] Texas courts generally label such proceedings "out-of-time appeals." J.A. 27. Other states use different labels. *See, e.g.*, *State v. Fuller*, 870 N.E.2d 255, 261-62 (Ohio Ct. App. 2007) ("delayed appeal"); *State v. Gross*, 760 A.2d 725, 755 (Md. 2005) ("belated appeal"). This brief uses the generic term "reinstated appeal."

II. Facts And Procedural History

1. In November 1991, petitioner Carlos Jimenez pleaded guilty in a Texas trial court to a felony burglary charge and admitted an enhancement based on a prior conviction. J.A. 76. As a result of his plea, Jimenez was placed on deferred adjudication probation for five years, leaving open the possibility that the charges against him could ultimately be dismissed. *Id.* Jimenez did not appeal. In November 1995, at the prosecutors' request, the state trial court revoked Jimenez's deferred adjudication and sentenced him to forty-three years in prison. *Id.* at 76-77.

2. A new attorney, Duke Hooten, was appointed to represent Jimenez on appeal and, on January 24, 1996, filed a notice of appeal on Jimenez's behalf. *Id.* at 55, 77.

While the appeal was pending in the spring of 1996, Jimenez wrote his counsel that he had been transferred from the Tom Green County Jail to a state prison in Abilene. *See* Order of Trial Court Recommending Grant of Out of Time Appeal ("Recommendation #1"), Ex. 1 to Attachment 2. Jimenez also sought information regarding his pending appeal from both Hooten and the Texas Third Court of Appeals. *Id.*, Ex. 1 & Ex. 3. Hooten did not respond, while the Court of Appeals wrote back to tell Jimenez that his letter had been misaddressed and had been forwarded to the appropriate court clerk. *Id.*, Ex. 2.

On July 12, 1996, Hooten filed a brief with the Third Court of Appeals in which he advised the court,

pursuant to *Anders v. California*, 386 U.S. 738 (1967), that petitioner lacked any grounds for appeal and, on that ground, sought to withdraw from his representation of petitioner. J.A. 19, 77. Hooten also certified to the Court of Appeals that he had hand-delivered a letter informing Jimenez of his right to file a pro se brief to the Tom Green County Jail. *Id.* at 22. However, because Jimenez had been transferred to a state facility months earlier, he did not receive either the letter or a copy of the *Anders* brief. *Id.* at 23. As a result, he did not file his own appellate brief. *Id.* at 11.

On September 11, 1996, having granted Hooten's motion to withdraw and not having received any pro se brief from his client, the Third Court of Appeals dismissed Jimenez's appeal. *Id.* at 10-12. Jimenez did not at that time receive copies of the opinion and judgment, which were mailed to him at the Tom Green County Jail. *Id.* at 23. Jimenez was thus unaware of the result of his appeal on October 11, 1996, when the time for seeking further review from the Texas Court of Criminal Appeals expired. *Id.* at 23. In fact, it was not until a year later, in September 1997, that Jimenez learned from the Third Circuit, in a response to his further inquiry, that his appeal had been dismissed. *Id.*

3. On April 11, 2002, Jimenez filed a pro se habeas corpus petition in state court, arguing among other things that Hooten's failure to properly notify him of his motion to withdraw deprived Jimenez of his right to an appeal. *Id.* at 20-21. After reviewing the evidence, the court found that Jimenez had repeatedly "inquire[d] . . . as to what was filed in the

appeal and what happened to the appeal after the appeal was dismissed," and that "[n]either the copy of the *Anders* brief or the letter dated July 12, 1996 was ever delivered by attorney Duke Hooten to the petitioner." *Id.* at 22-23. As a result, the court found, Jimenez "did not learn of the dismissal of his appeal until September 1997," *id.* at 23, and "was not afforded the right to examine the record, and the right to file a pro se brief." *Id.* at 24. Accordingly, the court held that Hooten's conduct had deprived petitioner of his right to appeal and recommended that Jimenez be granted a reinstated appeal as a remedy. *Id.* at 24-25.

Although a number of years had passed between the dismissal of petitioner's original appeal and his request for reinstatement,[2] the State raised no laches defense to his petition. In fact, the State filed no objection to the petition in either the trial court or the Court of Criminal Appeals. Accordingly, on September 25, 2002, the Court of Criminal Appeals accepted the trial court's recommendation and granted Jimenez's petition. In so doing, it ordered Jimenez "returned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal." *Id.* at 27. The court also specifically ruled that "[f]or purposes of the Texas Rules of Appellate

---

[2] As outlined in greater detail in his petition for certiorari, *see* Pet. 18-21, Jimenez's filing of his first state habeas petition was substantially delayed by the difficulties he experienced, despite his best efforts, in obtaining legal assistance.

Procedure, all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this Court issues." *Id.*

Subsequently, Jimenez and his new court-appointed counsel, Shawntell McKillop, filed a timely notice of appeal in October 2002. *Id.* at 57. After McKillop filed an *Anders* brief in December 2002, Jimenez filed a *pro se* brief with the Third Court of Appeals, which affirmed his conviction and sentence in May 2003. *Id.* at 43-47. Jimenez timely sought discretionary review from the Texas Court of Criminal Appeals, which denied his petition on October 8, 2003 without written order. *Id.* at 78. Jimenez did not seek review from this Court.

4. On December 6, 2004, Jimenez filed a state habeas petition in which, among other things, he raised claims alleging ineffective assistance by his trial counsel. *Id.* at 61-63. The trial court addressed the merits of petitioner's ineffectiveness claim and recommended that relief be denied. *Id.* at 73-74. The Court of Criminal Appeals agreed and denied Jimenez's petition without written order on June 29, 2005. *Id.* at 79.

5. Having exhausted his remedies in the state courts, Jimenez immediately sought relief in the federal courts, filing a habeas petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Texas on July 19, 2005. J.A. 78. Among other things, the federal petition claimed that petitioner received ineffective assistance of counsel at trial and at his revocation hearing. *Id.* at 79.

In response, the state argued that the petition was time-barred under 28 U.S.C. § 2244(d)(1)(A), which establishes a one-year limitations period to file a federal habeas petition, accruing on the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." In the State's view, "direct review" of Jimenez's judgment of conviction and sentence ended when the court of appeals dismissed his original appeal and he failed to petition for discretionary review from the Court of Criminal Appeals or this Court.

Jimenez countered that his federal habeas petition was not time-barred because AEDPA's statute of limitations ran from the conclusion of his direct appeal, as reinstated. Relying on the Fourth Circuit's decision in *Frasch v. Peguese*, 414 F.3d 518 (2005), Jimenez argued that the one-year limitations period did not begin to run until January 6, 2004, when the time expired for filing a petition for certiorari to this Court from the denial of discretionary review of his reinstated appeal, and was then tolled while his state habeas application was pending.

On October 23, 2006, the district court dismissed Jimenez's habeas petition as untimely. J.A. 80-93. It deemed itself bound by the Fifth Circuit's holding in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir.), *cert. denied*, 541 U.S. 1032 (2004), that when a Texas prisoner is granted the right to file a reinstated petition for discretionary review in the Texas Court of Criminal Appeals, "the relief tolls the AEDPA's statute of limitations until the date on which the

Court of Criminal Appeals declines to grant further relief, but it does not require a federal court to restart the running of AEDPA's limitations period altogether." J.A. 90-91 (citation omitted). Thus, the district court concluded, "for purposes of the AEDPA's statute of limitations, the revocation of Petitioner's deferred adjudication community supervision became final on October 11, 1996, when his time for seeking direct review expired, and the granting of permission to file a reinstated appeal did not 'restart' the limitations period. The one-year limitations period expired on October 11, 1997, and the instant petition is clearly time-barred unless Petitioner demonstrates that he is entitled to statutory or equitable tolling," *id.* at 91, which, in the district court's view, he was not, *id.* at 92-93.

6. Both the district court and the Fifth Circuit denied Jimenez's request for a certificate of appealability. *Id.* at 94-95, 124-25. Jimenez then filed a petition for certiorari, which this Court granted on March 17, 2008. 128 S. Ct. 1646 (2008).

SUMMARY OF ARGUMENT

The federal habeas statute allows state defendants to challenge their judgment of conviction in federal court within one year of the "the date on which the judgment became final." 28 U.S.C. § 2244(d)(1)(A). The statute then defines finality in traditional terms, providing that the state judgment becomes final upon "conclusion of direct review or the expiration of the time for seeking such review." *Id.*

In this case, the Texas courts found that petitioner was denied his right to a direct appeal by the constitutionally inadequate representation afforded him by the State. Under this Court's decisions, the established remedy for such Sixth Amendment violations is the reinstatement of the defendant's direct appeal. This eliminates one of the harms of the constitutional violation by allowing the defendant a new opportunity for direct review of his conviction and sentence. But, according to the Fifth Circuit, Congress has precluded states from remedying another harm created by the Sixth Amendment violation – the diminishment, and sometimes complete elimination, of the defendant's right to seek federal habeas review.

That is so, the Fifth Circuit says, because the reinstated appeal is not a form of "direct review" within the meaning of Section 2244(d)(1)(A) and, therefore, the defendant's time to seek federal habeas does not run from its completion. Instead, the Fifth Circuit has held, time for seeking federal review runs from the conclusion of the initial botched appeal. That reading is impossible to square with the text of

the statute, traditional conceptions of finality, and the purposes of the federal habeas provisions.

1. A reinstated appeal is indistinguishable in purpose and operation from any other form of direct review. The Texas courts have held that reinstatement restores the pendency of the direct appeal and that while the appeal is pending the judgment is not final (so that, for example, a state habeas challenge to the conviction is premature). The appeal is heard by the state intermediate court of appeals, which only has jurisdiction to decide cases on direct appeal. During the appeal, the defendant has a right to court-appointed counsel, a right afforded to non-capital defendants only for direct appeals. And the proceedings are treated as a direct appeal for purposes of *Teague v. Lane*, 489 U.S. 288 (1989), and the state's general prohibition against resolving ineffective assistance of counsel claims on direct appeal.

2. The Fifth Circuit has nonetheless declared that reinstated appeals are not a form of direct review because they are granted after the initial deadline for pursuing a direct appeal has expired. Once the federal limitations period begins, the court of appeals has said, Congress intended it to run continuously, subject to interruption only by operation of the federal tolling provision.

That assumption has no basis in the text, which provides that the limitations period begins from the expiration of the time for seeking direct review *or* the conclusion of direct review. 28 U.S.C. § 2254(d)(1)(A). When a court accepts a case for direct review after the time for seeking such review has expired, the

eventual appellate decision still constitutes the "conclusion of direct review" under any reasonable construction of those words.

There is nothing unusual about a limitations period that may, on occasion, be restarted. This Court has recognized that sometimes a court may suspend the finality of a seemingly final judgment by ordering further consideration of the defendant's judgment of conviction. That is what happens when a court reopens the time for taking an appeal after the initial deadline has already passed. And in that circumstance, no one thinks that the judgment remains final even while the court is considering the belated appeal. Nor does anyone believe that the federal limitation period commences to run before the reinstated appeal runs its course.

The break in the linear progression of the limitations period is no more problematic here, where permission to take an otherwise untimely appeal was granted to remedy a constitutional violation. A contrary rule would lead to absurd results. In the Fifth Circuit's view, the federal one-year limitations period begins to run as soon as the defendant loses his right of appeal (in this case, for example, when without his knowledge or participation, petitioner's appeal was dismissed and the time to seek further review expired). Even if the defendant discovers the loss quickly, and obtains reinstatement of his appeal without delay, in many cases the federal limitations period will run out before the reinstated state appeal is finally decided. When that happens, the defendant will be forced to file his federal habeas petition even before he has exhausted state review. That result is

entirely incompatible with the assumptions and purposes of the federal habeas statute, which requires federal courts to await the completion of state review and then to defer substantially to its results.

The Fifth Circuit's solution to this problem is to label the reinstated appeal a form of "collateral review," thereby invoking the federal tolling provision while the reinstated appeal is pending. *See* 28 U.S.C. § 2244(d)(2). There are two serious problems with this proposal. First, it provides no solution in states that do not reinstate appeals through a collateral proceeding. Second, even in states that reinstate appeals through habeas, the tolling provision on its face does not apply to the time spent pursuing the reinstated appeal. Section 2244(d)(2) tolls only the time during which "a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). And this Court has made clear that once a petition for collateral review is granted (and the time for appealing that decision has expired), the application is no longer pending and the limitations period begins to run again. As a result, once a state grants a habeas petition – either by ordering a new trial or granting a new appeal – the tolling provision no longer applies. Instead, the federal clock starts over upon the completion of the direct review arising from the new proceedings ordered by the habeas court.

2. The Fifth Circuit disagrees, asserting that if an appeal is the "product of state habeas review, it does not arise under the 'direct review' procedures of

the Texas judicial system" within the meaning of Section 2244(d)(1)(A)." *Salinas*, 354 F.3d at 431.

Again, this assertion finds no support in the text of Section 2244(d)(1)(A), which simply asks whether the appeal itself constitutes "direct review," and gives no relevance to the means by which that review is obtained. States employ all manner of mechanisms for deciding whether to consider an otherwise untimely appeal. As reflected in the text of the statute, Congress did not intend to allow reinstated appeals to restart the federal limitations clock in Montana (which grants reinstatement by motion to the state supreme court) but not in Texas (which considers such requests through habeas petitions).

In any event, there is nothing strange about habeas petitions leading to a remedy that restarts the federal habeas clock. Indeed, such an outcome is common when a state habeas court orders a new trial. No one doubts that when that trial leads to a new round of direct review, the defendant will have a full year from the conclusion of that direct review to file his federal petition. There is no reason for a different result when the state court tailors the habeas remedy to the constitutional harm by ordering only a new appeal.

3. Treating reinstated appeals as a form of direct review under the federal limitations period is consistent with the purposes of the federal habeas statute, which was designed with principles of comity and federalism foremost in mind. The Fifth Circuit's contrary rule contravenes those purposes by short-circuiting the state direct review process and disregarding states' considered determination that in

some instances a direct appeal should be allowed despite the passing of the ordinary appeal deadline.

At the same time, the court of appeals' construction of the statute diminishes, and sometimes eliminates entirely, the states' ability to fully remedy the unconstitutional deficiencies in the counsel they appoint to represent indigent defendants.

Allowing states the leeway to decide when and how to remedy Sixth Amendment violations does not unduly infringe on their interests in the finality of their criminal judgments. To the contrary, under petitioner's construction of the statute, states are empowered to decide for themselves how best to balance the need for finality and the equally important need to remedy violations of their citizens' constitutional rights. Some states may decide to impose short, determinate deadlines for seeking reinstatement of an appeal lost by counsel's deficient performance. Others, like Texas, may choose a more flexible approach, applying doctrines like laches to judge the timeliness if such requests. By design, Section 2244(d)(1)(A) leaves that choice to each state, commanding simply that once direct review has concluded under whatever rules a state may adopt, the defendant must file his federal petition within a year.

ARGUMENT

I. A Reinstated Appeal Constitutes "Direct Review" For Purposes Of The Federal Habeas Statute Of Limitations.

In the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), Congress provided that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). This period begins to run at the latest of four events, the first of which is at issue in this case: "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A).

In this case, it is undisputed that if the Texas courts' consideration of petitioner's reinstated appeal qualifies as "direct review" within the meaning of Section 2244(d)(1)(A), his federal habeas petition was timely.[3] On the other hand, if the one-year period

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[3] Review of petitioner's reinstated appeal concluded on January 6, 2004, ninety days after the Texas Court of Criminal Appeals denied his petition for discretionary review. *See Clay v. United States*, 537 U.S. 522, 527-28 & n.3 (2003) (direct review concludes upon expiration of time for seeking certiorari); S. Ct. R. 13.1 (petition for certiorari due ninety days after entry of judgment); J.A. 79 (Texas Court of Criminal Appeals denied habeas petition on October 8, 2003). Three hundred and thirty-five days later, on December 6, 2004, Jimenez filed his habeas petition in state court, J.A. 79, thereby tolling the federal limitations period until June 29, 2005, when the Texas Court of

instead is computed from a date before the conclusion of his reinstated appeal, the federal petition was untimely.

A. Whether A State Proceeding Is Part Of The State's System Of "Direct Review" Turns On A Question Of State Law.

Under Section 2244(d)(1)(A), the federal limitations period is measured from the date on which a criminal judgment becomes "final." The provision then defines finality in terms of the conclusion of "direct review," consistent with this Court's traditional understanding of the finality of state court judgments in the habeas context. *See, e.g., Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) ("By 'final' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."); *see also Clay*, 537 U.S. at 527 (same).

Section 2244(d)(1)(A) does not define what constitutes "direct review" for purposes of the federal limitations period. But the term has a common understanding and must be construed in light of the traditional notions of finality AEDPA codified. *Cf. Clay*, 537 U.S. at 527-28 ("Because we presume that

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Criminal Appeals' denied his petition. *See* 28 U.S.C. § 2244(d)(2); J.A. 29. At that point, petitioner had thirty days remaining in the federal limitations period, making his petition due on July 30, 2005. The petition was filed on July 19, 2005. J.A. 79.

Congress expects its statutes to be read in conformity with this Court's precedents, our unvarying understanding of finality for collateral review purposes would ordinarily determine the meaning of 'becomes final' in § 2255.") (quotation marks and citation omitted). Direct review, used in this context, distinguishes the process by which courts review in the first instance the validity of a defendant's conviction and sentence, as distinguished from habeas or other forms of collateral review, which provide a secondary and more limited opportunity to challenge the validity of a judgment that has already survived scrutiny under direct review. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (discussing differences between direct and collateral review); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (same). Congress followed that basic distinction in Section 2244(d), delaying the commencement of the federal limitations period until the completion of direct review, 28 U.S.C. § 2244(d)(1)(A), and tolling it for the time "during which a properly filed application for State post-conviction or other collateral review . . . is pending," *id.* § 2244(d)(2).

Deciding whether a particular state proceeding is part of the state's system of "direct review" necessarily requires an examination of state law. *See Salinas*, 354 F.3d at 430 n.5; *Frasch v. Peguese*, 414 F.3d 518, 522 (4th Cir. 2005); *see also Carey*, 536 U.S. at 223 ("Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions . . ."); *Richfield Oil Corp. v. State Bd. of Equalization*, 329

U.S. 69, 72 (1946) (determining whether a state judgment is final may require "resort to the local law to determine what effect the judgment has under the state rules of practice"). Moreover, the question turns on "how [the] state procedure functions, rather than the particular name that it bears." *Carey*, 536 U.S. at 223.[4]

As discussed next, in Texas, a reinstated appeal functions as a part of the State's system of direct review and, therefore, the federal limitations period begins to run only after the reinstated appeal has run its course.

B. Texas Allows Defendants To Pursue Direct Review Through Reinstated Appeals In Certain Limited Circumstances.

In Texas, a criminal defendant may seek direct review of his conviction and sentence by filing a notice of appeal within thirty days after his sentence is imposed. Tex. R. App. P. 26.2(a).[5] Like most

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[4] Thus, in a related context, this Court has repeatedly held that whether a state habeas petition is "properly filed" for purposes of federal tolling provision, turns on a question of state law. *See, e.g.*, *Allen v. Siebert*, 128 S. Ct. 2, 4 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005); *Evans v. Chavis*, 546 U.S. 189 (2006).

[5] Defendants also may seek discretionary review of the court of appeals' decision by filing a petition for discretionary review with the Texas Court of Criminal Appeals (the State's court of final resort on criminal matters) within thirty days after the court of appeals' judgment is rendered. *Id.* R. 68.2.

jurisdictions, however, Texas appellate courts may nonetheless consider direct appeals in certain additional circumstances as well.

1. Otherwise untimely appeals may be considered, for example, under Texas Rule of Appellate Procedure 26.3. Under that rule, the court of appeals may grant an extension of time to file a notice of appeal even after the time for appealing has expired, so long as the defendant files his motion "within 15 days of the deadline for filing the notice of appeal." *See also* Tex. R. App. P. 68.2 (same for reinstated petitions for discretionary review by the Texas Court of Criminal Appeals).

2. In addition, as illustrated by this case, Texas courts will order that a direct appeal be reinstated beyond those fifteen days when the defendant lost his right to appeal because of the constitutionally deficient performance of counsel.

That practice helps to fulfill the State's Sixth Amendment obligations. While states need not provide appellate review of criminal convictions, when they do, they may not "grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty." *Douglas v. California*, 372 U.S. 353, 355 (1963). As a result, indigent defendants are entitled to the assistance of counsel on direct appeal. *Id.* at 355-56. Moreover, because "the right to counsel on appeal . . . would be a futile gesture unless it comprehended the right to the effective assistance of counsel," defendants have a constitutional right to effective assistance of counsel on appeal. *Evitts v. Lucey*, 469

U.S. 387, 397 (1985); *see also Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

When that right is violated, and defendants lose their right to appeal altogether, the only constitutionally adequate remedy is one that places "persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of'" the violation. *United States v. Virginia*, 518 U.S. 515, 547 (1996) (citation omitted); *see also United States v. Morrison*, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation . . .").

In light of these principles, when a defendant loses his right to pursue a direct appeal as a result of the constitutionally ineffective assistance of his counsel, Texas courts remedy the violation by allowing the defendant to file a new notice of appeal. *See, e.g., Radcliff v. Texas*, 126 S.W.3d 534, 536 (Tex. App. 2003); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997).

This is accomplished through the State's habeas regime. Tex. Code Crim. Proc. Art. 11.07. A defendant seeking reinstatement of his appeal first files a habeas petition with the court of conviction. That court makes a recommendation to the Texas Court of Criminal Appeals. *Id.* § 3. The Court of Criminal Appeals then decides whether to order the relief. *Id.*; *see also, e.g., Reyes v. Texas*, 883 S.W.2d 291, 293 n.2 (Tex. App. 1994) (explaining this process). The defendant can secure a reinstated appeal only by demonstrating that the

constitutionally deficient performance of his counsel "result[ed] in the deprivation of . . . an appeal." *Ex parte Crow*, 180 S.W.3d 135, 138 (Tex. Crim. App. 2005); *see also Ex parte Owens*, 206 S.W.3d 670, 675 (Tex. Crim. App. 2006) (noting Texas applies standard derived from *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (establishing test for constitutional violation of right to counsel in context of denial of access to appeal)); *Ex parte Scott*, 190 S.W.3d 672, 673 (Tex. Crim. App. 2006) (burden of proving entitlement to relief is upon the defendant); *Ex parte Galvan*, 770 S.W.2d 822, 823 (Tex. Crim. App. 1989) (same). If the defendant sustains his burden, the Texas Court of Criminal Appeals will "return [the] Applicant to the point at which he can give notice of appeal." *Mestas v. State*, 214 S.W.3d 1, 2 (Tex. Crim. App. 2007). Accordingly, an order allowing a reinstated appeal usually states:

> For purposes of the Texas Rules of Appellate Procedure, all time limits shall be calculated as if the conviction had been entered on the day that the mandate of this Court issues. We hold that Applicant, should he desire to prosecute an appeal, must take affirmative steps to see that notice of appeal is given within thirty days after the mandate of this Court has issued.

Id.; *see also id.* at 2 n.1 (noting that the court "often use[s] this or similar language in opinions granting out-of-time appeals"); J.A. 27 (order in this case).

Although the Texas courts and the State Legislature have declined to impose a determinate time limit to seek the reinstatement of an appeal in

non-capital cases,[6] ordinary principles of laches nonetheless apply. Thus, a defendant's unreasonable delay will lead to the dismissal of his application if the delay prejudices the State's ability to respond. *See Ex parte Carrio*, 992 S.W.2d 486, 488 (Tex. Crim. App. 1999).

2. Texas is far from alone in permitting reinstatement of otherwise untimely direct appeals.

Other states, and the federal courts, allow defendants who have missed appeal deadlines to apply for post-hoc extensions of time or permission to reopen the time to appeal. Like Texas, numerous jurisdictions permit extensions even after the time for appealing has already expired, often based on simply "good cause," so long as the request is made promptly. *See, e.g.*, Tex. R. App. P. 26.3, 68.2;[7] Fed. R. App. P. 4(a)(5)(A), (b)(4).[8] Many jurisdictions also

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[6] *See Ex parte Galvan*, 770 S.W.2d 822, (Tex. Crim. App. 1989) (noting that "[s]uch a rule would be arbitrary and probably unconstitutional") (citing Tex. Const. Art. I, § 12). The legislature *has* established a deadline for appeal reinstatement petitions in capital cases. *See* Tex. Code. Crim. Proc. Art. 11.071.

[7] For other states, see also, *e.g.*, Colo. App. R. (4)(b)(1); Haw. R. App. Proc. 4(b)(5); Ill. R. Crim. App. Proc. 606(c); Mass. R. App. Proc. 4(c); N.D. R. App. Proc. 4(b)(4); N.J. Ct. R. 2:4-4(a); Utah R. App. Proc. 4(e).

[8] The rules governing reinstated appeals in federal court are illustrative of the basic appellate practices Congress must have had in mind in formulating Section 2244(d)(1)(A). They are also relevant because AEDPA also created a one-year limitations period for habeas review of federal convictions, and provided that it shall run from "the date on which the judgment

allow courts to revive an otherwise forfeited appeal even after longer delays, or impose no fixed time limits at all.[9] In most instances, the practice governed by court rule. *See supra* n.7. In others, the practice is established by judicial doctrines. *See, e.g., In re Welfare of S.M.E.*, 725 N.W.2d 740, 744 (Minn. 2007) (allowing reinstated appeal based on court's "inherent authority").[10]

Likewise, both state and federal courts commonly reinstate direct appeals when the right to appeal was lost as a result of constitutionally ineffective

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of conviction becomes final." 28 U.S.C. § 2255(f)(1). And in *Clay v. United States*, 537 U.S. 522 (2003), this Court concluded that the phrase "becomes final . . . calls for a reading surely no less broad than . . . § 2244(d)(1)(A)'s specification 'becomes final by the conclusion of direct review or the expiration of the time for seeking such review.'" *Id.* at 530.

[9] *See, e.g.*, Ark. R. App. P. Crim. 2(e) (allowing court to reopen time for appeal as much as eighteen months after judgment issued); Ill. R. Crim. App. Proc. 606(c) (six months); Mass. R. App. Proc. 14(b) (up to one year); Mich. Ct. R. 7.205(F) (same); Mont. R. App. Proc. 4(6) (no time limit); Ohio R. App. Proc. 26(b)(2)(B) (ninety days, or longer if "good cause" for delay shown); Wash. R. App. Proc. 18.8(a)-(b) (no time limit); Okla. R. Ct. Crim. App. 2.1(E) (eighteen months); Fed. R. App. P. 4(a)(6)(B) (rule applicable to federal habeas appeals) (180 days).

[10] At the time Congress enacted AEDPA, this Court allowed equitable tolling of the time for filing a notice of appeal in federal court in certain "unique circumstances." *See Bowles v. Russell*, 127 S. Ct. 2360 (2007) (discussing and overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. INS*, 375 U.S. 384 (1964)).

assistance of counsel.[11] In doing so, they follow the

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[11] **State cases:** *Kargus v. Kansas*, 162 P.3d 818, 831 (Kan. 2007); *Colorado v. Long*, 126 P.3d 284, 287 (Colo. App. 2005); *Wallace v. Tennessee*, 121 S.W.3d 652, 660 (Tenn. 2003); *Missouri v. Stubblefield*, 97 S.W.3d 476, 477 (Mo. 2003); *Middlebrook v. Delaware*, 815 A.2d 739, 743 (Del. 2003); *Montana v. Tweed*, 59 P.3d 1105, 1110 (Mont. 2002); *Maryland v. Gross*, 760 A.2d 725, 742 (Md. App. 2000); *Nebraska v. McCracken*, 615 N.W.2d 902, 913-15 (Neb. 2000); *State v. Trowell*, 739 So. 2d 77, 80 (Fla. 1999); *Davis v. State*, 877 S.W.2d 93, 93 (Ark. 1994); *Young v. State*, 902 P.2d 1089, 1091 (Okla. Crim. App 1994); *Ponder v. State*, 400 S.E.2d 922, 924 (Ga. 1991); *Foote v. State*, 751 P.2d 884, 887 (Wyo. 1988); *Barnett v. Mississippi*, 497 So. 2d 443, 444 (Miss. 1986); *Loop v. Solem*, 398 N.W.2d 140, 144 (S.D. 1986); *Louisiana v. Counterman*, 475 So. 2d 336, 339 (La. 1985); *Ex parte Sturdivant*, 460 So. 2d 1210, 1212 (Ala. 1984).

Federal habeas cases reviewing federal convictions: *United States v. Shedrick*, 493 F.3d 292, 303 (3d Cir. 2007); *United States v. Hadden*, 475 F.3d 652, 661 n.8 (4th Cir. 2007); *United States v. Snitz*, 342 F.3d 1154, 1159 (10th Cir. 2003); *McIver v. United States*, 307 F.3d 1327, 1329, 1330 (11th Cir. 2002); *Barrientos v. United States*, 668 F.2d 838, 842 (5th Cir. 1982); *Garcia v. United States*, 278 F.3d 134, 138 (2d Cir. 2002); *United States v. Torres-Otero*, 232 F.3d 24, 29 (1st Cir. 2000); *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998); *Hollis v. United States*, 687 F.2d 257, 259 (8th Cir. 1982); *Dillane v. United States*, 350 F.2d 732, 733 (D.C. Cir. 1965).

Federal habeas cases reviewing state convictions: *White v. Johnson*, 180 F.3d 648, 656 (5th Cir. 1999); *Hannon v. Maschner*, 981 F.2d 1142, 1145 (10th Cir. 1992); *Lozada v. Deed*, 964 F.2d 956, 959 (9th Cir. 1992); *Lombard v. Lynaugh*, 868 F.2d 1475, 1484 (5th Cir. 1989); *Cannon v. Berry*, 727 F.2d 1020, 1025 (11th Cir. 1984); *Mylar v. Alabama*, 671 F.2d 1299, 1302 (11th Cir. 1982); *Passmore v. Estelle*, 607 F.2d 662, 664 (5th Cir. 1979).

example set by this Court. For example, in *Rodriquez v. United States*, 395 U.S. 327 (1969), a federal prisoner alleged that "he had been improperly denied his right to appeal" when "he had told his counsel to perfect an appeal, but that counsel had failed to do so." *Id.* at 328. This Court agreed and provided that the "judgment is reversed and the case is remanded to the District Court where petitioner should be re-sentenced so that he may perfect an appeal in the manner prescribed by the applicable rules." *Id.* at 332. Likewise, in *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court approved the same remedy in the context of federal habeas review of a state conviction. In *Evitts*, state-appointed counsel similarly failed to perfect an appeal, leading to its dismissal. *Id.* at 389-90. This Court affirmed the federal district court's grant of a "conditional writ of habeas corpus ordering [the defendant's] release unless the Commonwealth either reinstated his appeal or retried him," *id.* at 390, noting with approval that the practice has been followed in both state and federal courts, *id.* at 399 n.10.

Given their intended function – to place the defendant back in the position he would have been in but for the violation of his constitutional rights – it should come as no surprise that, as discussed next, such appeals operate as part of the process of direct review.

C. A Reinstated Appeal Functions As Part Of Direct Review.

1. There seems to be little dispute that in Texas a reinstated appeal functions precisely in the same

manner as the initial appeal the defendant was wrongfully denied.

The Texas Court of Criminal Appeals has explained that "granting an out-of-time appeal restores the pendency of the direct appeal." *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997). Thus, while that appeal is pending, the case is "still on direct appeal" and the defendant's conviction is "not yet final." *Samarron v. State*, 150 S.W.3d 701, 706 n.6 (Tex. App. 2004). *See also, e.g.*, *Ex parte Garcia*, 988 S.W.2d 240, 241 (Tex. Crim. App. 1999) (same). In *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), the Fifth Circuit accordingly acknowledged that "[w]hen the Court of Criminal Appeals grants the right to file an 'out-of-time' [petition for discretionary review], it restores the petitioner to the position he was in when he first possessed the right to petition for discretionary review," and therefore places the defendant "in the midst of the direct review process," *id.* at 429; *see also id.* at 429 n.4 (noting same is true with respect to permission to file reinstated appeal).

Because the Texas courts consider a reinstated appeal to be part of the state system of direct review, that should "be the end of the matter." *Carey*, 536 U.S. at 226. In *Carey*, this Court explained that a state's determination that a state habeas petition was untimely was conclusive for purposes of determining whether the petition was "properly filed" within the meaning of AEDPA's tolling provision. 536 U.S. at 226; *see also Evans v. Chavis*, 546 U.S. 189, 194, 198 (2006) (same). The same deference is due to a state's determination that a reinstated

appeal functions as part of the state's system of direct review. *See Orange v. Calbone*, 318 F.3d 1167, 1170 (10th Cir. 2003).

2. In any event, even if the State's determination were not conclusive, it is plainly correct. In every relevant respect, a reinstated appeal functions identically to any other appeal on direct review in Texas.

First, the ordinary direct appeal rules and procedures apply to reinstated appeals. The defendant must, for example, file a timely notice of appeal. *Mestas*, 214 S.W.3d at 2. And his appeal is given a caption indicative of an ordinary direct appeal: the defendant is designated as the "appellant" and the State the "appellee," whereas in a habeas case the defendant is called the "petitioner" or "applicant" and the caption reads "*Ex parte* [Defendant]." *Compare, e.g., Duran v. State*, 868 S.W.2d 879, 879 (Tex. App. 1993) (reinstated appeal) *with Ex parte Drake*, 883 S.W.2d 213, 213-14 (Tex. Crim. App. 1994) (habeas petition).

In addition, consistent with their status as part of the direct review of criminal convictions, reinstated appeals are heard by the Court of Appeals, *see, e.g., Duran*, 868 S.W.2d at 879-80, which has jurisdiction to decide direct appeals but not collateral claims. *See* Tex. Code Crim. Proc. Art. 4.03, 44.45 (describing jurisdiction of Court of Appeals); *Board of Pardons and Paroles ex rel. Keene v. Eighth Court of Appeals*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (Texas Court of Criminal Appeals has exclusive jurisdiction of state habeas claims); Tex. Code Crim. Proc. Art. 11.07 (same).

Second, during the reinstated appeal, the defendant has a right to court-appointed counsel,[12] a right that is provided in non-capital cases for direct appeals only. *See* Tex. Code Crim. Proc. Art. 1.051(d)(1)-(3), 11.071(2)(a).

Third, the scope of appellate review is the same as in any direct appeal, and different from the scope of review in collateral proceedings. For example, a court hearing a reinstated appeal applies new constitutional rules of criminal procedure that apply only on direct, and not collateral, review. *See, e.g.*, *Samarron v. State*, 150 S.W.3d 701, 702, 705-06 n.6 (Tex. App. 2004) (in determining whether the rule in *Crawford v. Washington*, 541 U.S. 36 (2004), should apply in a reinstated appeal, holding that the retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989), was not applicable because the case was "still on direct appeal"); *compare Ex parte Keith*, 202 S.W.3d 767 (Tex. Crim. App. 2006) (holding that *Crawford* did not apply retroactively to state habeas cases); *see also Ex parte Pennington*, 471 S.W.2d 578, 581-82 (Tex. Crim. App. 1971) (new rules apply in

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[12] *See* J.A. 27, 44; *see also, e.g.*, *Jones v. State*, 98 S.W.3d 700, 704 (Tex. Crim. App. 2003); *Ex parte Axel*, 757 S.W.2d 369, 375 (Tex. Crim. App. 1988); *Talbert v. State*, No. 01-88-986-CR, 1992 WL 49806 (Tex. App. Mar. 19, 1992) (not designated for publication); *Ex parte Raley*, 528 S.W.2d 257, 259 (Tex. Crim. App. 1975); *see also Garcia v. State*, No. 04-99-00513-CR, 2000 WL 33128686, at *3-*4 (Tex. App. Dec. 6, 2000) (not designated for publication) (holding that it was error for trial court to wait four months after grant of reinstated appeal before appointing counsel to aid on appeal).

reinstated appeals); *Cruz v. State*, 441 S.W.2d 542 (Tex. Crim. App. 1969) (same). At the same time, courts hearing reinstated appeals will *not* decide claims – like ineffective assistance of trial counsel – that may be heard only on habeas review. *See Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997).

Fourth, the standard of review applied in reinstated appeals is, again, the same as applied in any other direct appeal and different from the standard applied in collateral review. *Compare, e.g., Figueroa v. State*, 250 S.W.3d 490, 499 (Tex. App. 2008) (applying ordinary standards of appellate review to reinstated appeal) *with Ex parte Drake*, 883 S.W.2d at 215 (discussing limited scope of habeas review, including bar against reviewing claims previously raised on direct review).

Fifth, if the defendant prevails in the reinstated appeal, the judgment below is directly reversed, in contrast with the traditional remedies applied in collateral view, under which the defendant is ordered freed contingent upon the State providing a new trial or other relief. *Compare, e.g., Duran*, 868 S.W.2d at 882 (in reinstated appeal, court "reverse[d] the trial court conviction and remand[ed]") *with Ex parte Byrd*, 162 S.W.3d 250, 254 (Tex. Crim. App. 2005) (in habeas case, ordering that "[r]elief is granted"), *Ex parte Ridgeway*, 579 S.W.2d 935, 936 (Tex. Crim. App. 1979) (habeas court ordering prisoner "released from any further confinement"), *and* Tex. Code Crim. Proc. Art 11.07 § 5 (court in habeas case may issue order "remanding the applicant to custody or ordering his release"). In deciding a reinstated

appeal, the state court thus "is reviewing the *judgment*" (the purpose of direct review) rather than determining "the lawfulness of the [defendant's] custody *simpliciter*" (the hallmark of habeas review). *Coleman*, 501 U.S. at 730 (emphasis in original).

Sixth, a reinstated appeal is treated as direct review under the rules governing habeas claims in Texas. For example, because "granting an out-of-time appeal restores the pendency of the direct appeal," state courts lack jurisdiction over any habeas petition challenging the same conviction while the reinstated appeal is pending. *Ex parte Garcia*, 988 S.W.2d at 241; *Ex parte Torres*, 943 S.W.2d at 472 (citing *Ex parte Brown*, 662 S.W.2d 3, 4 (Tex. Crim. App. 1983)). In addition, neither the petition to reinstate nor the resulting appeal is treated as a prior habeas petition for purposes of the state's prohibition against successive habeas petitions. *See Ex parte Santana*, 227 S.W.3d 700, 703-04 (Tex. Crim. App. 2007); *Ex parte McPherson*, 32 S.W.3d 860, 860-61 (Tex. Crim. App. 2000); *Ex parte Torres*, 943 S.W.2d at 471-74.

II. The Fifth Circuit's Reasons For Refusing To Treat A Reinstated Appeal As Part Of "Direct Review" Are Meritless.

Although acknowledging that a reinstated appeal is functionally indistinguishable from any other form of direct review, the Fifth Circuit nonetheless has concluded that it is not a part of the "direct review" envisioned by Section 2244(d)(1)(A). The court advanced two reasons for this conclusion, neither of which is persuasive.

A. By Providing A Limitations Period That Runs From The Latest Of Several Possible Starting Points, Congress Contemplated That The Time Limit Would Start Over In Some Cases.

The Fifth Circuit objected in *Salinas* that treating reinstated appeals as part of the direct review of a defendant's judgment would inappropriately restart the federal limitations period that had already begun to run when the defendant missed his original appeal deadline. "On its face," the court maintained, "AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the periods in between." 354 F.3d at 429. In the view of the court of appeals, "nothing in AEDPA allows for a properly initiated limitations period to be terminated altogether by collateral state court action." *Id.* at 430. The Fifth Circuit is simply wrong.

As this Court has explained with respect to the 90-day period for filing a petition for certiorari, in some cases "the actions of a party or a lower court suspend the finality of a judgment and thereby reset the 90-day 'clock.'" *Limtiaco v. Camacho*, 127 S. Ct. 1413, 1418 (2007) (citation omitted). For instance, "a lower court's appropriate decision to rehear an appeal may suspend the finality of a judgment." *Id.* In such cases, the time for seeking certiorari, which initially began to run when the lower court issued its judgment, restarts at the conclusion of the reinstated appellate proceedings. *Id.*; *Hibbs v. Winn*, 542 U.S.

88, 97-98 (2004); *Young v. Harper*, 520 U.S. 143, 147 n.1 (1997); S. Ct. R. 13.3.

The same is true when, rather than rehearing an appeal, a court reinstates and hears an appeal after the appeals deadline has passed. The extension "suspends the finality of the judgment" and "reset[s] the . . . clock" for seeking further review of the resulting decision. *Limtiaco*, 127 S. Ct. at 1418. That is why it is accepted without question that a judgment does not become final upon expiration of the time to file an appeal when a court exercises its discretion to reopen the time to appeal under a rule like Tex. R. App. P. 26.3 or Fed. R. App. P. 4(b)(4). This is true even though the necessary consequence of such extensions is a break in the linear progression of the federal limitations period: the day after the time for appealing expired, the federal clock began to run, only to be stopped when the reinstated appeal was allowed and restarted upon the conclusion of the resulting direct review.

There is no reason for a different conception of finality when a state court considers an otherwise untimely appeal because the prior appeal was dismissed, and the defendant's appeal rights lost, as a result of a violation of the defendant's constitutional rights. The state court's decision to rehear petitioner's direct appeal has the same effect on finality as "a lower court's appropriate decision to rehear an appeal" because it has come to doubt the correctness of its decision. *Limtiaco*, 127 S. Ct. at 1418.

Certainly nothing in the text of Section 2244(d)(1)(A) supports the Fifth Circuit's departure

from that traditional understanding. Indeed, the text is directly to the contrary. The provision allows the defendant one year to seek federal habeas review from the date his conviction becomes "final by the conclusion of direct review *or* the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A) (emphasis added). By using the disjunctive, Congress ensured that a defendant would have a year from the conclusion of direct review or from the expiration of time for seeking such review in the first instance, whichever came later.[13] And while it may be uncommon for the conclusion of direct review to follow a missed appeal deadline, the practice of allowing reinstated appeals illustrates that this circumstance does arise with some regularity. Under the plain language of Section 2244(d)(1)(A), when that circumstance *does* arise, the time limit runs from the conclusion of direct review, not earlier.

Pointing to the "statutory framework," the Fifth Circuit nonetheless insists that Congress expected that once the federal clock began running, it would not stop except pursuant to the tolling provision. *Salinas*, 354 F.3d at 429-30. But the broader structure of the Act shows the opposite. By providing

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[13] There is no basis to think that Congress intended Section 2244(d)(1)(A) to run from the *earlier* of the "conclusion of direct review or the expiration of the time for seeking such review." Under that reading, the clock would start running before a timely filed appeal was even heard and, if the court took more than a year to brief and decide a case, could expire before direct review was concluded.

that the limitations period "shall run from the *latest* of" a number of events, 28 U.S.C. § 2244(d)(1)(A) (emphasis added), Congress virtually ensured that in some cases the time for filing a habeas petition would be revived after the time for seeking federal relief, by all appearances, had long expired. Take, for example, a prisoner who does not file a federal petition within a year after his conviction became final within in the meaning of subsection (d)(1)(A). Congress nonetheless provided three circumstances in which the federal limitations period would begin anew: (1) the cessation of state action in violation of federal law that prevented the defendant from filing earlier; (2) this Court's recognition of a new, retroactively applied constitutional right; or (3) the discovery of new evidence establishing the factual predicate of a previously unavailable claim. *Id.* § 2244(d)(1)(B)-(D). When any of those circumstances arise, there is a break in the "linear" progression of the federal limitations period and the federal clock is restarted, sometimes many years after it first expired.

Likewise, the statutory definition of a "final" state court judgment in subsection (d)(1)(A) provides two alternative dates and, in so doing, creates the possibility that the time for seeking federal habeas review will be restarted when the later of the two conditions is met, even if the time for seeking habeas review under the first condition has already run. When Congress enacted this definition, it was well established that the "conclusion of direct review" would sometimes post-date the "expiration of time for seeking such review," both under rules like Texas

Rule of Appellate Procedure 26.3, and in ineffective assistance of counsel cases under the aegis of this Court's 1969 and 1985 decisions in *Rodriquez* and *Evitts*. *See supra* n.12.

B. A Direct Appeal Is Part Of "Direct Review" Even If Ordered As A Habeas Remedy For A Constitutional Violation.

The Fifth Circuit has further concluded that a reinstated appeal cannot constitute a form of direct review, at least in Texas, because even if the appeal itself is indistinguishable from any other direct appeal, it is obtained through a collateral proceeding, under the state habeas statute. *Salinas*, 354 F.3d at 430-31. That is, in the Fifth Circuit's view, if the reinstated appeal "is necessarily the product of state habeas review, it does not arise under the 'direct review' procedures of the Texas judicial system" within the meaning of Section 2244(d)(1)(A). 354 F.3d at 431.

This reasoning is based on an incorrect premise. The question under the federal limitations provision is whether *the appeal itself* is a form of "direct review"; the mechanism by which a state considers whether to grant such review is beside the point. It makes no sense to believe that Congress intended the application of the limitations period to turn on the precise mechanism by which the defendant seeks to have his appeal reinstated.

1. The text of Section 2244(d)(1)(A) provides no basis for the Fifth Circuit's rule. The provision simply states that the federal limitations period runs from the "conclusion of direct review"; how the

defendant secured the right to pursue that direct review is irrelevant. *See Frasch*, 414 F.3d at 522-23.

To hold otherwise would lead to arbitrary treatment of similarly situated defendants based on the nomenclature a state uses to describe the procedure which enabled that defendant to obtain consideration of an untimely appeal. To be sure, some states like Texas resolve ineffective assistance of counsel claims through their habeas procedures, which are well-suited for developing the factual predicate of such claims. But courts in other jurisdictions make precisely the same determination without using a collateral proceeding and, as a result, under the Fifth Circuit's reasoning, reinstated appeals in those states would restart the time for seeking federal habeas relief. For example, when an appeal has been dismissed as a result of counsel's failure to perfect or prosecute the appeal, some courts allow the defendant to ask the appellate court to recall its mandate and reinstate the appeal. *See United States v. Winterhalder*, 724 F.2d 109 (10th Cir. 1983) (collecting cases). And in other jurisdictions, defendants may move for reinstatement of their appeals directly in the appellate court. *See, e.g., Montana v. Tweed*, 59 P.3d 1105, 1109 (Mont. 2002); *State v. Trowell*, 739 So. 2d 77, 80 (Fla. 1999); Mich. Ct. R. 7.203(B)(5).

No purpose would be served by restarting the federal limitations period when a reinstated appeal is allowed in Montana, but not in Texas, simply because Montana grants such appeals upon a motion filed with the State Supreme Court, while Texas uses a habeas petition filed in the court of conviction and

ruled upon by the Texas Court of Criminal Appeals. And the Fifth Circuit provided no reason to think Congress intended to interject such arbitrary and unequal treatment into the federal habeas system.

2. In any event, there is nothing incongruent, or even unusual, about a successful state habeas petition leading to new direct review proceedings followed by a new right to federal habeas review. The most common example arises when a state habeas court orders a new trial. If the defendant is convicted again, the defendant will be allowed to appeal the judgment entered after his second trial, followed by a fresh round of federal habeas review of the results of that second trial and appeal. *See, e.g., Penry v. Johnson*, 532 U.S. 782, 790-91 (2001) (reviewing federal habeas petition challenging conviction secured after prior successful habeas petition). To petitioner's knowledge, no court has ever doubted that when a successful state habeas petition results in a new trial, the time for seeking federal habeas review runs from the conclusion of the direct review of the re-conviction, even though the new round of state direct review is concededly "the product of state habeas review." *Salinas*, 354 F.3d at 431. To hold otherwise often would lead to the absurdity of requiring a prisoner to file a federal habeas petition even before his new trial was completed, or was still on appeal.

There is no reason for a different result when the habeas court orders a reinstated appeal, rather than

a new trial to be followed by a new direct appeal.[14] In both instances, the successful habeas petition results in a new round of state proceedings to determine whether the state will continue to deprive the defendant of his liberty. With that new round of proceedings, there is a fresh risk of constitutional error of the kind that federal habeas is designed to remedy. And in both cases, it makes little sense as a practical matter to begin federal proceedings until

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[14] It is no answer that a new trial results in a new judgment and, for that reason alone, the time for seeking federal habeas starts over again. *Cf.* BIO 11-12. The same often is true when courts order a new appeal. In *Rodriquez*, for example, this Court ordered that the prisoner's sentence be vacated and then immediately reinstated to start the appellate process over again. 395 U.S. at 332. In that circumstance, the defendant has a new judgment no less so than if he had been tried again and re-convicted. Here, the Court of Criminal Appeals did not say whether the initial judgment against petitioner was vacated. But, in other cases, the court has been explicit that the reinstated appeal remedy requires vacating the original judgment. *See, e.g., Ex parte Axel*, 757 S.W.2d 369, 375 (1988). In any event, the operation of the federal limitations period cannot turn on the esoteric technicality of whether the state court's remedial order expressly vacates the original judgment or simply returns the defendant to the same position he would be in, for all practical purposes, if the judgment had been vacated. This Court should not lightly assume that Congress intended that access to the Great Writ – an historic bulwark against arbitrary government action – would itself depend on arbitrary distinctions in state practice. *Cf. Torres-Otero*, 232 F.3d at 29 (declining to give significance to district court's failure to vacate initial judgment prior to allowing reinstated appeal).

the new round of state review ordered by the habeas court has run its course.

III. Treating Reinstated Appeals As Part Of The Direct Review Process Is Consistent With AEDPA's Purposes.

Construing reinstated appeals as part of "direct review" under Section 2244(d)(1)(A) is consistent with "AEDPA's purpose to further the principles of comity, finality, and federalism," *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (citation omitted), while also promoting the equally critical interest in ensuring meaningful access to habeas remedies and full relief for the violation of defendants' important constitutional rights.

A. Delaying Federal Habeas Until The Conclusion Of A Reinstated Appeal Furthers AEDPA's Goal Of Comity With The State Courts.

Awaiting the final decision of a state court reviewing a reinstated appeal is necessary to show state courts the respect Congress intended AEDPA to afford their judgments.

1. There is no question that a reinstated appeal provides the state "the opportunity to fully consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon the judgment." *Duncan*, 533 U.S. at 178. Indeed, the reporters are full of examples illustrating that reinstated appeals regularly result in the correction of constitutional errors that otherwise would have gone unreviewed

and uncorrected by the state courts.[15] Thus, delaying the start of the federal limitations period until a reinstated appeal has run its course "protect[s] the state courts' role in the enforcement of federal law" and "prevent[s] disruption of state judicial proceedings," *id.* at 179 (citations omitted), no less than in the case of an appeal allowed on the basis of a timely notice of appeal.

2. Respondent's interpretation of Section 2244(d)(1)(A), on the other hand, "violates these principles by encouraging state prisoners to file federal habeas petitions *before* the State completes a full round" of direct review. *Carey*, 536 U.S. at 220 (finding an equivalent defect in an interpretation of a federal tolling provision that would force inmates to seek federal habeas before collateral review was completed). In this case, for example, petitioner became aware of his lost appeal a year after it was dismissed, and eleven months after his conviction became final under the Fifth Circuit's rule.[16] Even if

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[15] *See, e.g., Davis v. State*, 631 S.E. 2d 815, 817 (Ga. App. 2006); *Samarron v. State*, 150 S.W.3d 701, 702 (Tex. App.—San Antonio 2004); *Gonzalez v. State*, 148 S.W.3d 702, 704 (Tex. App. 2004); *Ex parte Fountain*, 842 So. 2d 726, 730 (Ala. 2001); *White v. State*, 916 S.W.2d 78, 82 (Tex. App. 1996); *State v. Carney*, 663 So. 2d 470, 471, 473 (La. Ct. App. 1995); *Duran v. Texas*, 868 S.W.2d 879, 880 (Tex. App. 1993); *Cruz v. State*, 411 S.W.2d 542 (Tex. Crim. App. 1969).

[16] It was not unreasonable for petitioner to think that his appeal might still be pending at that point. Over the 10-year period from 1998 to 2007, the average elapsed time between filing and disposition of a criminal direct appeal in Texas was 10.3 months. State of Texas Office of Court Administration,

he had petitioned for and received a reinstated appeal right away, his federal habeas petition would have been due long before the state courts had an opportunity to rule on his reinstated appeal. Indeed, even when defendants become aware of the loss of their appeals rights immediately, it will be the rare case in which the state appellate process – including not only the briefing, argument and decision in the immediate appeal, but also the filing of petitions for discretionary review in the Court of Criminal Appeals and this Court (not to mention the proceedings in either court if such review were granted) – will run its course before a federal petition is due under the Fifth Circuit's construction of the Act. *See supra* n.17.

The result would be untenable. Federal review of the petition would offend basic principles of comity, for "it would be unseemly in our dual system of

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ANNUAL STATISTICAL REPORT OF THE TEXAS JUDICIARY - FISCAL YEAR 2007, at 29, *available at* http://www.courts.state.tx.us/pubs/AR2007/published-annual-report-2007.pdf. Over 13 percent of direct criminal appeals remain pending for more than 12 months. State of Texas Office of Court Administration, COURT OF APPEALS ACTIVITY DETAIL, *available at* http://www.courts.state.tx.us/pubs/AR2007/coas/4-activity-detail-2007.xls

Yearlong delays are common in criminal appeals in other states as well. For instance, during fiscal year 2002-03 (the last year for which statistics are available), at least half of California criminal appeals took 405 days or more to decide, and at least 10 percent took 676 days or more. Judicial Council of California, 2004 COURT STATISTICS REPORT 19, *available at* www.courtinfo.ca.gov/reference/documents/csr2004.pdf.

government for a federal district court to upset a state court conviction without providing the state courts with an opportunity to correct a constitutional violation." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). At the same time, it would be entirely unfair to dismiss the prisoner's petition for failure to exhaust state remedies when the only reason he was filing it before those remedies were exhausted was because an unnecessarily paradoxical interpretation of what counts as "direct review" compelled him to file prematurely. *See Carey*, 536 U.S. at 220 (rejecting construction of Section 2244(d) that would "produce a serious statutory anomaly" by requiring federal courts "to contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the 1-year statute of limitations)").

In addition, it is difficult to see how federal review of the defendant's judgment would even be possible while a reinstated appeal remained pending. AEDPA pervasively requires federal habeas courts to defer to the course and result of state proceedings that have, Congress assumed, concluded before federal proceedings take place. For example, the federal court must defer to the factual findings of the state court, 28 U.S.C. § 2254(e)(1), and is limited to deciding whether the defendant is imprisoned on the basis of a "decision that was contrary to, or involved an unreasonable application of clearly established Federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.

§ 2254(d)(1), (2). In a case like petitioner's, the state appellate courts' only occasion to review the facts and apply "established Federal law" will be during the reinstated appeal. Until that process is complete, there is little for the federal courts to review.

3. Perhaps recognizing that its construction of Section 2244(d)(1)(A) would naturally lead to these untenable results, the Fifth Circuit has held that the granting of a reinstated appeal "tolls AEDPA's statute of limitations" while the reinstated review is ongoing, "but it does not require a federal court to restart the running of AEDPA's limitations period altogether." *Salinas*, 354 F.3d at 430. Under that view, if a defendant discovers the loss of his appeal rights quickly enough, and seeks reinstatement in state court within a year of its forfeiture, he will have some time (although perhaps very little) to file a federal habeas petition at the completion of the state review of his reinstated appeal.

Whatever its pragmatic appeal, this solution is entirely incompatible with the text of the statute. The tolling provision applies only during the period a "properly filed application for State post-conviction or other collateral review . . . is *pending*" (emphasis added). Once the application is finally ruled upon – in this case, by ordering the reinstated appeal as a habeas remedy – the *state habeas petition* (as opposed to the direct appeal) is no longer "pending" and the tolling provision no longer applies. *See Lawrence*, 127 S. Ct. at 1083 (holding that once a habeas petition is conclusively granted or denied, the "application for state postconviction review no longer exists" and, therefore, tolling under Section

2244(d)(2) ends); *Carey*, 536 U.S. at 219-20. A reinstated appeal is the *result* of state collateral review, not a continuation of it. It is no more a part of the state habeas process than a new state trial is part of the federal habeas process when ordered by a federal district court.

In addition, the Fifth Circuit's tolling rule would not apply in states that reinstate appeals outside of habeas. For example, in Montana, defendants denied their right of appeal by the ineffective assistance of their counsel file a motion directly with the state supreme court, rather than commencing a separate collateral proceeding. *Montana v. Tweed*, 59 P.3d 1105, 1109 (Mont. 2002); *see also State v. Trowell*, 739 So. 2d 77, 80 (Fla. 1999); Mich. Ct. R. 7.203(B)(5). There is simply no way to characterize the time spent resolving a reinstated appeal in such a state as "time during which a properly filed application for State post-conviction or other collateral review ... is pending." 28 U.S.C. § 2244(d)(2). As a result, even under the Fifth Circuit's strained construction of the federal tolling provision, defendants frequently would be forced to file habeas petitions while their reinstated appeals remained under consideration in states like Montana, Florida, and Michigan. There is no reason to think that Congress intended that result, much less that it intended this intolerable situation to arise in some states but not in others.

B. Treating Reinstated Appeals As Part Of "Direct Review" Ensures That Defendants Have A Fair Opportunity To Vindicate Important Constitutional Rights.

Petitioner's construction of the limitations period also accords appropriate respect for the equally important need to ensure that defendants have a fair opportunity to air their constitutional claims, and to obtain remedies for violations of their constitutional rights.

1. Congress set the federal statute of limitations at one year after the completion of direct review in order to ensure that petitioners would have adequate time to prepare a petition to file in federal court. Because state prisoners have no right to appointed counsel in federal habeas proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), the inmate needs time to either find private counsel (who will then need time to review the inmate's case) or undertake the daunting task of researching and preparing the petition *pro se*. A defendant's need for time to accomplish these tasks is no less when that petition follows a reinstated appeal. Moreover, because AEDPA requires federal habeas courts to defer substantially to the proceedings and findings of the state courts, the contours of a plausible federal habeas claim often cannot be determined until the state process has run its course. Yet, under the Fifth Circuit's view – even accepting its tolling rule – a defendant who has been denied effective assistance of counsel, and lost his right to a direct appeal as a consequence, almost always will have much less time

to research and prepare his federal petition than he would have if the state had complied with its Sixth Amendment obligations in the original proceedings.

Petitioner's construction, on the other hand, is consistent with Congress's determination that a full year should be allowed for a habeas petitioner to prepare his federal petition. The preparation of a federal habeas petition is a complex task, with grave consequences when a defendant fails to get it right. Neither the federal courts, nor the cause of justice, are served by requiring inmates to file federal habeas petitions without adequate time to research, prepare and present their claims.

2. Petitioner's construction of the Act also permits state courts to provide fully effective remedies for the violation of state defendants' right to effective assistance of counsel on direct appeal.

Treating a reinstated appeal as part of direct review allows state courts to place defendants in "'the position they would have occupied in the absence of'" a violation of their right to effective assistance of counsel. *United States v. Virginia*, 518 U.S. at 547 (citation omitted); *see also Radcliff v. Texas*, 126 S.W.3d 534, 536 (Tex. Ct. App. 2003). The defendant regains both his right of direct appeal and the full scope of his federal habeas rights.

On the other hand, under the Fifth Circuit's view, while a state court may be able to reinstate the state direct appeal, it can never fully undo the damage wrought on the defendant's federal habeas rights. Even in the best of circumstances – when a defendant quickly discovers the loss of his right to appeal and

promptly secures its reinstatement – the defendant will lose a portion of the time Congress afforded him to prepare and file his federal habeas petition. But the longer the loss goes undiscovered or uncorrected in state court, the less time the defendant will have to file his federal petition at the conclusion of his direct appeal. And if the defendant does not discover and seek redress for the loss of his appeal rights within a year, he will lose his right to federal habeas entirely.[17]

That is hardly an effective remedy for a constitutional violation. *See McIver*, 307 F.3d at 1331 (noting that if a defendant in such circumstances "were denied the opportunity to bring a collateral challenge after waging the out-of-time appeal, he would not in fact be restored to the position he would have occupied had counsel not abandoned him"); *cf.*

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[17] At least, the Fifth Circuit's interpretation would prevent the state court from securing fully effective relief by reinstating the defendant's lost appeal. Oddly enough, the Fifth Circuit's reading might permit the state court to restore the defendant entirely to his prior position – including recapturing his right to eventual federal habeas review – by ordering a new trial rather than a new appeal. In that circumstance, if re-convicted, the defendant apparently would be entitled to a new appeal and, seemingly, a fresh limitations period for federal habeas review of the direct review of the new conviction. *See* BIO 11-12.

Needless to say, no legitimate purpose is served by putting states in the position of having to choose between a fully effective remedy and the needless expenditure of state resources on a new trial. And there is no reason to believe that Congress intended Section 2244 to operate in such a disrespectful manner.

Smith v. Robbins, 528 U.S. 259, 265 (2000) (noting the states' obligation to adopt appellate procedures that "adequately safeguard a defendant's right to appellate counsel").

There is nothing in the text or legislative history of AEDPA that should lead this Court to believe that Congress intended Section 2244(d) to have this untoward effect. To the contrary, elsewhere in the Act, Congress expressly recognized the importance of effective assistance of counsel and took steps to encourage states to improve representation in criminal proceedings. *See* 28 U.S.C. § 2261(b)-(c).

C. Allowing State Courts To Decide If And When To Allow Reinstated Appeals Does Not Intrude On AEDPA's Interest In Fostering Finality.

Finally, awaiting the decision of the state courts on a reinstated appeal does not unduly infringe upon the state's interest in the finality of its judgments.

1. Under petitioner's reading of Section 2244, the question of how to balance the need for finality and the state's equally important obligation to ensure the fairness and constitutionality of its trials is left entirely in the state's hands. Nothing in AEDPA prohibits a state from establishing and strictly enforcing a single appeals deadline, allowing no exceptions under any circumstances. Nor does the statute preclude states from requiring that requests to reinstate appeals be made within a short and definite time after the expiration of the time to appeal.

At the same time, nothing in AEDPA *requires* a state to enact such measures either. Section 2244 says nothing about how long a state may give a defendant to file a notice of appeal or how long a state court may take to decide it. It is silent about whether states must enact a single deadline for taking an appeal, whether they may permit extensions of time after the initial deadline has passed, or whether the courts may permit reinstated appeals and, if so, under what circumstances and time limits. And it includes no requirement that a state measure the timeliness of the invocation of appellate review by firm deadlines rather than flexible concepts such as reasonableness or laches. *See Carey*, 536 U.S. at 222-23 (noting that California permits appeals taken within a "reasonable time" and that although the "California's timeliness standard is general rather than precise," it still governs for purposes of AEDPA).[18]

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[18] This does not mean, of course, that the theoretical possibility that a court may someday allow a defendant to take a reinstated appeal means that the "expiration of the time for seeking such review" never arrives. 28 U.S.C. § 2244(d)(1)(A). As described above, the law provides a number of circumstances in which the finality of a judgment may be suspended – including, for example, by newly discovered evidence, recognition of a new constitutional right with retroactive application, or the *sua sponte* recall of a mandate – but it is commonly understood that once a judgment has achieved finality under the ordinary rules, it remains final unless and until one of those events occurs. Here, once the time for seeking direct review has elapsed without the defendant seeking further appellate review, the criminal judgment should be considered

This is hardly surprising. A statute enacted to better respect the autonomy and dignity of the State courts could hardly dictate to those courts timetables for deciding cases on direct review. Instead, Congress trusted States to make responsible judgments about the competing needs for finality and the protection of defendants' rights. To paraphrase this Court's statement in *Carey*, "it is the State's interests that the [AEDPA time limitations] seek[] to protect and the State, through its Supreme Court decisions or legislation" can adjust state rules for reinstated appeals "should that prove necessary." 536 U.S. at 223.

2. In any event, there is no reason to believe that the Fifth Circuit's rule is necessary to avoid inundating the federal courts with stale habeas claims.

There is every indication that states have taken seriously their responsibility for establishing reasonable deadlines for the completion of direct review. *See, e.g.*, *Orange*, 318 F.3d at 1172 (noting that the court's "review of Oklahoma case law suggests that an application for a direct appeal out of time is rarely granted"). As described above, many states have established determinate limits on the time in which a defendant make seek a reinstated appeal. Most require that the defendant do so within a very short time absent a truly compelling justification. *See supra* n.8. Those that allow

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final unless and until a state court suspends its finality by reinstating a direct appeal.

requests for a longer time often require a substantially greater justification before reinstating an appeal. *See*, *e.g.*, Mont. R. App. Proc. 4(6) (imposing no firm deadline, but providing that reinstatement allowed only in "the infrequent harsh case and under extraordinary circumstances amount to a gross miscarriage of justice").

This is certainly true in Texas. Once fifteen days have passed since the filing deadline, defendants like petitioner can obtain a reinstated appeal only by showing that they were deprived of their appeal by the constitutionally defective performance of counsel. *See*, *e.g.*, *Ex parte Crow*, 180 S.W.3d 135, 137-38 (Tex. Crim. App. 2005). The test for ineffective assistance of counsel is not easy, and the defendant bears the burden of proving it. *Ex parte Scott*, 190 S.W.3d 672, 673 (Tex. Crim. App. 2006); *Ex parte Galvan*, 770 S.W.2d 822, 823 (Tex. Crim. App. 1989).

Critically, under Texas law, the State is protected against undue delay by the doctrine of laches, *see Ex parte Carrio*, 992 S.W.2d at 488, which this Court and Congress for many years considered to be a wholly adequate means of protecting state's interests in the finality of their judgments. *See also generally Lonchar v. Thomas*, 517 U.S. 314, 326-28 (1996) (discussing history of habeas time limits in federal system). Moreover, even when delay does not result in the outright dismissal of a defendant's application, "a petitioner's delay in seeking relief can prejudice the credibility of his claim." *Ex parte Galvan*, 770 S.W.2d at 824 (quoting *Ex parte Rocha*, 482 S.W.2d 169, 170 (Tex. Crim. App. 1972)). While respondent has noted the delay in this case, it failed to raise

laches in the state courts or, for that matter, to oppose petitioner's request for reinstatement of his appeal on any ground.[19]

The volume of appeals reinstated by the Texas Court of Criminal Appeals corresponds precisely to the severe crisis in indigent defense that plagued the State for many years. *See generally* Brief of Texas Fair Defense Project and Texas Criminal Defense Lawyers Association. There is, however, reason to hope that recent developments may reduce the need for such relief in the future. In 2001, the Texas legislature passed the Texas Fair Defense Act, 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 906, in an effort to overhaul and improve the quality of appointed representation in the State. And more recently, the Texas Court of Criminal Appeals amended its Rules of Appellate Procedure to require, for the first time, that trial courts inform a defendant of "his rights concerning an appeal, as well as any right to file a pro se petition for discretionary review." Tex. R. App. P. 25.2(d) (added Aug. 20, 2007). *See also* Tex. R. App. P. 25.2(h) (requiring that when a "defendant has a right of appeal, the court shall (orally and in writing) advise the defendant of his right of appeal and of the requirements for timely

---

[19] Nor did respondent ever attempt to assert a laches defense in federal court. Accordingly, this Court need not decide in this case whether a defendant's delay in seeking reinstatement of his appeal in state court could provide a basis, outside of Section 2244(d)(1)(A), for denying federal habeas relief.

filing a sufficient notice of appeal"). Prior to this point, state courts had no responsibility for informing defendants of their right to appeal, leaving that task to appointed counsel who sometimes failed in their duty, leading to the need for many reinstated appeals. *See, e.g., Ex parte Axel*, 757 S.W.2d 369, 371-75 (Tex. Crim. App. 1988).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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CARLOS JIMENEZ,

Petitioner,

v.

NATHANIEL QUARTERMAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Should a certificate of appealability have issued on whether the granting of an out-of-time appeal through a State's postconviction process restarts the one-year limitations period under 28 U.S.C. § 2244(d)(1)(A) or tolls the limitations period under § 2244(d)(2)?

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STATEMENT

A. Jimenez's Plea Bargain and Subsequent Revocation of Probation

In August 1991, Petitioner Carlos Jimenez was indicted in Texas state court for felony burglary, enhanced by his prior felony conviction for aggravated assault with a deadly weapon. SCR.1.[1] If convicted, Jimenez faced a prison sentence ranging from 15 years to life. *See* TEX. PENAL CODE §§ 12.42(c)(1), 30.02.

Jimenez, his counsel, and the State reached a plea agreement, SCR.8, under which Jimenez pled guilty to the burglary offense and "true" to the prior felony enhancement. SCR.15-19; 1.RR.4-5. Per that agreement, the court entered an order in November 1991, deferring adjudication and placing Jimenez on probation for five years. SCR.15-19.

Before entering the deferred-adjudication order, the judge advised Jimenez orally and in writing of the charges against him and the applicable punishment range. SCR.9-10; 1.RR.2-4. The judge also explained the conditions of his probation and the consequences

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[1] "SCR." refers to the clerk's record for Jimenez's first appeal (Cause No. 3-96-123-CR in the Austin Court of Appeals); "CCR." to the record for his first state habeas application (Cause No. 74,433 in the Texas Court of Criminal Appeals); "1.RR." to the reporter's record of his 1991 deferred-adjudication hearing; and "2.RR." to the reporter's record of his 1995 probation-revocation hearing.

of a violation. 1.RR.9-12, 14-25. Jimenez confirmed orally and in writing that he understood his plea bargain. *See* SCR.11-13; 1.RR.2-25.

In March 1995, the State moved to revoke Jimenez's probation based on his violations of four probation conditions: Jimenez intentionally injured Teresa Barron, failed to properly report his arrest for assaulting Barron, failed to report to his probation officer on numerous occasions, and failed to pay probation fees. SCR.26-27, 32-33.

At the November 1995 hearing on the revocation motion, Jimenez, again advised by counsel, admitted that he had failed to report to his probation officer and to pay his probation fees. 2.RR.10-15. The court heard testimony concerning the remaining charges from, among others, Jimenez himself, Barron, and the police officers who arrested Jimenez. *See* 2.RR.23-50, 76-108. The court concluded that Jimenez had violated his probation conditions on all four counts. 2.RR.113.

The court noted that, although Jimenez was given deferred-adjudication probation, a jury could not have given him probation if he was convicted as charged. 2.RR.114. The court also observed that Jimenez had "a long and regular criminal history," including his prior aggravated assault with a deadly weapon, the burglary charge, and, most recently, family violence. 2.RR.117; J.A.46. The court found him guilty, sentenced him to 43 years in prison, and denied his motion for new trial. SCR.35-38, 47-48.

B. Dismissal of Jimenez's Direct Appeal

The trial court appointed appellate counsel for Jimenez, SCR.54, who timely filed a notice of appeal, SCR.49.

In July 1996, Jimenez's counsel filed an *Anders* brief in the court of appeals, concluding, after a diligent review of the record, that Jimenez had no grounds for appeal. J.A.77.[2] But he did not serve the brief on Jimenez, as required by *Anders*. J.A.22-23. Nevertheless, the state court of appeals incorrectly stated that the brief met all the *Anders* requirements and noted that no *pro se* brief was filed. J.A.11.

In September 1996, the court of appeals dismissed Jimenez's appeal. J.A.10-12. Under then-existing Texas law, Jimenez could appeal nonjurisdictional errors in his revocation proceedings only if he had raised those errors by written motions filed and ruled on before trial; otherwise, he was required to obtain permission from the trial court to appeal. *Watson v. State*, 924 S.W.2d 711, 714-15 (Tex. Crim. App. 1996), *overruled by Hargesheimer v. State*, 182 S.W.3d 906, 912-13 (Tex. Crim. App. 2006).[3]

---

[2] *See Anders v. California*, 386 U.S. 738, 744 (1967).

[3] *Watson* had extended a procedural rule restricting appeals from judgments on plea bargains to govern appeals from judgments revoking deferred-adjudication probation. 924 S.W.2d at 714-15 (applying TEX. R. APP. P. 40(b)(1) (1997) [now TEX. R. APP. P. 25.2(a)(2)]). *Watson*'s holding was later limited to appeals regarding the adjudication of guilt; appeals concerning, for example, the *sentence* imposed upon revocation were no longer

(Continued on following page)

Finding that Jimenez's notice of appeal satisfied none of these conditions and that there was "no basis for challenging the district court's jurisdiction," the court dismissed his appeal. J.A.11.

C. Jimenez's State Habeas Applications and Out-of-Time Appeal

The court of appeals timely sent copies of its opinion and dismissal judgment to Jimenez, but at the wrong address. *See* CCR.42.[4] The documents apparently were not forwarded to him. *See id.* Although Jimenez had heard nothing from his attorney since at least July 1996 (when the *Anders* brief was filed), he waited over a year—until September 1997—to contact the court regarding the status of his appeal. *See* CCR.27. He then learned that the appeal had been dismissed. J.A.23.

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restricted by the rule. *See Vidaurri v. State*, 49 S.W.3d 880, 883-85 (Tex. Crim. App. 2001). In 2006, *Watson* was overruled, so the rule no longer restricts appeals from judgments revoking deferred-adjudication probation. *Hargesheimer*, 182 S.W.3d at 912-13.

[4] At the time he filed his *Anders* brief, Jimenez's appointed counsel advised the court of appeals that he had served the brief on Jimenez at the jail in Tom Green County. J.A.21-22; CCR.32-41. But Jimenez had already been moved to another prison. J.A.22. Thus, when the court of appeals sent its opinion and judgment to Jimenez, it incorrectly believed Jimenez was at the jail in Tom Green County, and Jimenez—who had not received the *Anders* brief—was unaware that the court had an incorrect address for him.

Four and a half years later, in April 2002, Jimenez filed a state habeas application, arguing that he had been denied the right to appeal based on the failure of his appointed counsel to serve him with a copy of his *Anders* brief. J.A.77. On September 25, 2002, the Texas Court of Criminal Appeals granted Jimenez permission to file an out-of-time appeal. J.A.26-29.

Jimenez's newly appointed counsel for the out-of-time appeal—like his previous counsel—determined that he had no legitimate grounds for appeal and filed an *Anders* brief. J.A.30-42. She observed that, with "ample evidence in the record that [Jimenez] was advised of the range of punishment," J.A.41, Jimenez nonetheless admitted that he had violated two probation conditions. J.A.40-41. Citing Texas's established rule that even a single proven probation violation supports revocation, Jimenez's attorney could find no "legitimate grounds for appeal." J.A.41.

Jimenez filed a *pro se* brief arguing, among other things, that he was denied his due-process right to a neutral judge during the probation-revocation proceedings. J.A.45. The court of appeals found this claim baseless, J.A.45-46, concluding that "nothing in the record . . . arguably support[s] [Jimenez's] appeal," J.A.47.

In December 2004, Jimenez filed his second state habeas application, which included claims related to the probation-revocation proceedings and specifically reurged the "neutral judge" claim. J.A.66. The trial

court rejected this claim, noting that a judge may be disqualified only for extrajudicial bias—an allegation that Jimenez had not made. J.A.68-70.

Jimenez also claimed that his counsel in the revocation proceedings was ineffective in failing to object and request the judge's disqualification and in allegedly inducing Jimenez to plead "true" to two of the State's allegations by representing that Jimenez would receive at most 15 years in prison. J.A.70, 73-74. Having concluded that Jimenez's bias claim was meritless, the court determined that objecting to the judge would not have been in Jimenez's best interest. J.A.74. As to the claim that counsel improperly induced Jimenez to plead "true" to probation violations, the court observed that: (1) there was no record evidence of counsel's alleged statement that Jimenez would receive no more than 15 years; (2) the prosecutor stated in open court that no plea agreement existed; and (3) the judge gave Jimenez an opportunity to renounce his plea of "true" to probation violations. J.A.70-73.

Concluding that none of the claims raised in Jimenez's second habeas application merited an evidentiary hearing, the court recommended dismissal of the application. J.A.74. In June 2005, the Texas Court of Criminal Appeals denied Jimenez's application without written order. J.A.78.

D. Jimenez's Petition for Federal Habeas Relief

In July 2005, Jimenez filed his federal habeas petition, reasserting his claims that he was denied his due-process right to a neutral judge during his probation-revocation proceedings, and that he received ineffective assistance of counsel in those proceedings. J.A.75-93. The district court dismissed the petition as time-barred without addressing the merits. J.A.80-93.

The court's decision turned on its application of § 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to Jimenez's claims. For persons in custody pursuant to a state-court judgment, the limitations period for filing a federal habeas petition is one year. 28 U.S.C. § 2244(d)(1). That period begins on the latest of four possible dates, the first of which is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A).

Although § 2244(d)(1)(A) provides the generally applicable limitations start date for federal habeas petitions, Congress anticipated that, because of certain circumstances beyond an inmate's control, habeas claims could not always be timely asserted under that provision's strict timeline. For those exceptional circumstances, § 2244(d)(1)(B)-(D) provide later limitations start dates. And the limitations periods in § 2244(d)(1) will be tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect

to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2).

In Jimenez's case, the court noted that the state court of appeals dismissed Jimenez's appeal of the judgment revoking his probation on September 11, 1996. J.A.89. The court concluded that this conviction became final thirty days later, on October 11, 1996, when his time for seeking further direct review expired. *Id.*[5] Thus, the court calculated that, under § 2244(d)(1)(A), Jimenez had to file his federal petition on or before October 11, 1997. *Id.* Because Jimenez did not file his federal petition until July 19, 2005, and he failed to demonstrate any statutory or equitable tolling of the limitations period for these claims, the court held that his claims were time-barred. J.A.91-92.

Jimenez argued that his federal petition was timely because the limitations period under § 2244(d)(1)(A) "restarted" when the Texas Court of Criminal Appeals granted him permission to file an out-of-time appeal. J.A.81-82. Thus, according to Jimenez, under § 2244(d)(1)(A) finality did not actually attach to the judgment revoking his probation until January 2004, when the time for him

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[5] In Texas, once an inmate's direct appeal has failed in an intermediate court of appeals, he can file a petition for discretionary review (PDR) in the Texas Court of Criminal Appeals. TEX. R. APP. P. 68. When an inmate fails to file a PDR, his conviction becomes final 30 days after the intermediate court of appeals's decision. *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003).

to file a certiorari petition following his out-of-time appeal expired. J.A.90.

The district court rejected Jimenez's argument that his out-of-time appeal "restarted" the federal habeas limitations period, citing *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004). J.A.89-92. In *Salinas*, the Fifth Circuit determined that, "[o]n its face, AEDPA provides for only a linear limitation period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between." 354 F.3d at 429. *Salinas* applied this principle to the granting of an out-of-time PDR to a Texas inmate, holding that this form of relief "tolls the AEDPA's statute of limitations until the date on which the Court of Criminal Appeals declines to grant further relief, but it does not require a federal court to restart the running of AEDPA's limitations period altogether." *Id.*

The court held that *Salinas* applied equally to an out-of-time appeal—which, like an out-of-time PDR, is "'necessarily the product of state habeas review.'" J.A.91 (quoting *Salinas*, 354 F.3d at 431). The court concluded that the revocation of Jimenez's deferred-adjudication probation became final on October 11, 1996, when his time for seeking further direct review expired. *Id.* And because the out-of-time appeal did not "restart" the limitations period, the court concluded that the one-year period for Jimenez to file his federal petition regarding claims related to the 1995 revocation order expired on October 11, 1997. Noting that Jimenez had filed both of his state habeas applications years after October 11, 1997, the

court held that he was not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2). J.A.91-92.

The district court denied a certificate of appealability for the reasons stated in its prior dismissal order. J.A.94-95. The Fifth Circuit agreed, concluding that reasonable jurists would not debate the correctness of the district court's conclusion that Jimenez's federal habeas petition was time-barred. J.A.124-25. The Court granted certiorari review. *Jimenez v. Quarterman*, 128 S. Ct. 1646 (2008).

SUMMARY OF THE ARGUMENT

Jimenez asserts that the lower courts' purported misinterpretation of the federal habeas limitations period has deprived him of a fair opportunity to vindicate his constitutional rights and has endangered the rights of similarly situated inmates. This narrative is a fallacy. Jimenez waited four and a half years to seek relief on his habeas claims, necessarily foreclosing his opportunity to obtain federal review. To overcome this marked lack of diligence, Jimenez now advances an interpretation of AEDPA that is at odds with the statute's text and structure, and that would thwart its important purposes. The lower courts' decisions are consistent with AEDPA's requirement that inmates promptly assert their rights, while affording inmates who timely assert their rights—unlike Jimenez—a fair opportunity to obtain federal habeas review.

1. Jimenez's case arises from the revocation of his probation. On appeal, Jimenez's appointed counsel filed an *Anders* brief but failed to provide a copy to Jimenez or notify him that he could file a *pro se* brief. Jimenez's appeal was dismissed in September 1996, and his state-court conviction became final in October 1996 when the time to seek further direct review expired (per § 2244(d)(1)(A)). Thus, under § 2244(d)(1)(A), Jimenez was required to file his federal habeas petition by October 1997, subject to tolling under § 2244(d)(2) during any state postconviction proceedings.

But Jimenez did not discover that his appeal had failed until almost a year later, in September 1997. The *Anders* brief filed by Jimenez's appointed appellate counsel, which was not served on Jimenez, gave the court of appeals an incorrect address for Jimenez. When the court of appeals dismissed his appeal shortly thereafter, it accordingly sent a copy of the decision to the wrong address. And because Jimenez had not received the *Anders* brief, he was unaware that the court had an incorrect address for him at that time.

Because of these unusual circumstances, Jimenez could have invoked § 2244(d)(1)(B) and (D), which provide later limitations start dates than § 2244(d)(1)(A) when an inmate belatedly discovers the factual predicate of his habeas claim or when a state-created impediment delays the timely filing of federal habeas claims. These provisions would have afforded Jimenez a full year, beginning in September

1997, to file his federal claims—and that period would have been tolled while he pursued his state habeas remedies. *See* 28 U.S.C. § 2244(d)(2). Inexplicably, however, Jimenez chose to wait four and a half years—from September 1997 until April 2002—before seeking state habeas relief. By that time, well more than one year had passed since the later limitations start dates available under § 2244(d)(1)(B) and (D).

2. In September 2002, Jimenez was granted an out-of-time appeal in state court, which allowed him to pursue a new appeal of his probation revocation. Jimenez contends that the granting of this out-of-time appeal "restarted" the federal limitations period under § 2244(d)(1)(A) by initiating a new "direct review." But § 2244(d)(1)(A)'s text does not contemplate multiple dates on which a state-court judgment becomes final. Rather, the statute provides a single, pinpointed finality date, based on a uniform federal rule, that finality "attaches when the Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003).

Jimenez's contrary interpretation, which envisions more than one finality date under § 2244(d)(1)(A), is problematic for several reasons. First, Jimenez's interpretation of § 2244(d)(1)(A) compromises *Clay*'s uniform federal rule for finality in favor of a finality assessment based on varying state remedies for ineffective assistance of appellate counsel. Second, under Jimenez's interpretation of § 2244(d)(1)(A), in

any case in which an inmate receives an out-of-time appeal, that appeal is unsuccessful, and the inmate does not seek certiorari review in this Court, the "time for seeking direct review" under § 2244(d)(1)(A) will expire *twice* in the same case—a result surely not envisioned by Congress. Third, by effectively placing state-court convictions into an indefinite "limbo" period under § 2244(d)(1)(A) whenever an out-of-time appeal might, years later, be granted by a state court, Jimenez's interpretation thwarts AEDPA's goals of curbing abusive delay and promoting judicial efficiency. Finally, Jimenez's theory also illogically assumes that Congress crafted § 2244(d)(1)(A), the background rule for finality, to address the exception that arises when an inmate learns months or years later that his direct appeal failed due to ineffective assistance of counsel.

3. Regardless of the merits of Jimenez's interpretation of § 2244(d)(1)(A), the answer to the question presented—whether the courts below should have issued a certificate of appealability (COA)—is "no."

A COA issues only to resolve questions that are "debatable" among "jurists of reason." And Jimenez was required to present a debatable question not only on the limitations issue, but also on his underlying constitutional claims.

He failed to do so. Because circuit precedent established that Jimenez's federal habeas petition was time-barred, it was not debatable that the lower

courts were bound to follow that precedent. And Jimenez's judicial-bias and ineffective-assistance claims are baseless in law and fact. Thus, the courts below properly denied Jimenez's application for a COA.

ARGUMENT

I. JIMENEZ'S LACK OF DILIGENCE RENDERED HIS FEDERAL HABEAS PETITION UNTIMELY.

A. Section 2244(d)'s One-Year Limitations Period Generally Begins on the Date That a State Judgment Became Final Under § 2244(d)(1)(A), Subject Only to Later Start Dates Provided in § 2244(d)(1)(B)-(D).

AEDPA provides that, for persons in custody pursuant to a state-court judgment, the limitations period for filing a federal habeas petition is one year. 28 U.S.C. § 2244(d)(1). That period begins to run on the latest of four possible dates, as explained in § 2244(d)(1):

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

Section 2244(d)(2) tolls § 2244(d)(1)'s one-year limitations period during the time that an inmate's "properly filed application for State post-conviction or other collateral review" concerning the underlying judgment is pending. *Id.* § 2244(d)(2).

Thus, § 2244(d)(1) "adopt[s] a tight time line" that "ordinarily run[s]" from the date on which the judgment became final under § 2244(d)(1)(A), *Mayle*

v. Felix, 545 U.S. 644, 662 (2005), subject to tolling under § 2244(d)(2). But § 2244(d)(1) also provides later start dates for claims that could not be timely asserted under § 2244(d)(1)(A)'s strict timeline because of circumstances beyond the inmate's control. Those specific exceptions are described in § 2244(d)(1)(B)-(D), and they reflect Congress's recognition of—and prescribed remedy for—exceptional circumstances justifying a later limitations start date for certain habeas claims.

1. Under § 2244(d)(1)(A), a state-court judgment becomes final when the Court denies certiorari review of the judgment or affirms the judgment on the merits, or when the time for the inmate to seek further review of the judgment expires.

The Court has explained that § 2244(d)(1)(A)'s words "'by the conclusion of direct review or the expiration of the time for seeking such review'" mean that finality "is to be determined by reference to a *uniform federal rule*" that the Court has fixed: "Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay*, 537 U.S. at 527, 531 (emphasis added). If the inmate stops the direct-review process in the lower courts, then finality attaches when the deadline for the next stage of

review expires. *E.g.*, *Roberts*, 319 F.3d at 694; *Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir. 2002). This definition of finality applies to the limitations period for review of state-court judgments of conviction under § 2244(d)(1)(A) as well as to federal convictions under 28 U.S.C. § 2255(f). *Clay*, 537 U.S. at 528-31.

Two interrelated aspects of finality under § 2244(d)(1)(A) bear emphasis here. First, § 2244(d)(1)(A) provides for a single point when finality attaches to a state-court judgment. *See* 28 U.S.C. § 2244(d)(1)(A); *see also Clay*, 537 U.S. at 528-31. The benefit of this standardized "pinpointed" date is that "finality assessments" are not made "by reference to state-law rules that may differ from the general federal rule and vary from State to State." *Clay*, 537 U.S. at 530-31.

Second, because the statute contemplates a single point when finality attaches, its language necessarily does not provide for more than one date when a state-court judgment "became final." A hypothetical scenario illustrates this principle. Suppose a state-court judgment unquestionably became final in year 1, when the time for seeking certiorari review expired. Ten years later, a state court allowed the inmate to pursue a new, out-of-time appeal, and that out-of-time appeal concluded two years later, in year 13. Nothing in § 2244(d)(1)(A)'s language supports a determination that, for purposes of § 2244(d)(1)'s uniform federal rule, the state-court judgment "became final" in year 1, generating one limitations start date, and then, ten years later,

"became unfinal" in year 11, leading to a second limitations start date when the judgment once again "became final" in year 13.

Rather, § 2244(d)(1)(A)'s directive that finality occurs upon "the" conclusion of direct review "or" "the" expiration of the time for seeking such review reflects two discrete, mutually exclusive events. Only one of those two events will happen: either the inmate will pursue direct review to its "conclusion" (the Court denies certiorari review or grants review and affirms the conviction[6]), or the inmate will stop seeking direct review at some point earlier in the process and the time for seeking direct review will "expir[e]." When one of these two events occurs, the judgment is "final" under § 2244(d)(1)(A).

2. In the unusual circumstances of Jimenez's case, § 2244(d)(1)(B) and (D) provided a later start date for his federal habeas limitations period.

Congress anticipated that certain circumstances could prevent an inmate, through no fault of his own, from filing federal habeas claims within one year of

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[6] The circuit courts "have uniformly interpreted 'direct review' in § 2244(d)(1)(A) to encompass review of a state conviction by this Court." *Clay*, 537 U.S. at 528 n.3. The Court later endorsed that interpretation in *Lawrence v. Florida*, 127 S. Ct. 1079, 1083-84 (2007).

§ 2244(d)(1)(A)'s finality date. To address those situations, § 2244(d)(1)(B)-(D) provide for later limitations start dates when a state-created impediment prevents the otherwise timely filing of federal claims (§ 2244(d)(1)(B)), when a newly recognized constitutional right is made retroactively applicable to cases on collateral review (§ 2244(d)(1)(C)), or when an inmate later discovers the factual predicate of his claim (§ 2244(d)(1)(D)). As the Court has observed, § 2244(d)(1) thus "provides one means of calculating the limitation with regard to the 'application' as a whole [§ 2244(d)(1)(A)] . . . but three others that require claim-by-claim consideration." *Pace v. DiGuglielmo*, 544 U.S. 408, 416 n.6 (2005).

Jimenez's case demonstrates the type of circumstance addressed by Congress in § 2244(d)(1)(B) and (D). On direct appeal of his state-court judgment, Jimenez's appointed counsel filed an *Anders* brief, but failed to deliver the brief to Jimenez or notify him that he could file a *pro se* brief. J.A.22-23. Further, the *Anders* brief provided an incorrect address for Jimenez to the court of appeals. *See supra* n.4. And while an inmate is typically responsible for ensuring that courts have his correct address, because Jimenez had not received the *Anders* brief he was unaware that the court did not have his correct address or that he was no longer represented by counsel. *See id.* Thus, when the court of appeals dismissed his case in September 1996, two months after the filing of the *Anders* brief in July 1996, it sent Jimenez's copy of the dismissal to an incorrect address. *See id.* Jimenez

only discovered that his appeal failed in September 1997, nearly one year after the state-court judgment became final through dismissal of his appeal. J.A.23; Pet. Br. 6.[7]

When, as in this case, an inmate only belatedly becomes aware that he received ineffective assistance of counsel on appeal, he may assert that the federal habeas limitations period for this claim should be calculated under § 2244(d)(1)(D), not § 2244(d)(1)(A). And under these circumstances, § 2244(d)(1)(D) will govern because an inmate like Jimenez could not have asserted a habeas claim based on ineffective assistance of counsel until "the date on which the factual predicate of [that claim] could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D); *see also Fleming v. Evans*, 481 F.3d 1249, 1255 (10th Cir. 2007) (recognizing that inmate properly invoked § 2244(d)(1)(D) when his counsel failed to move to withdraw guilty plea and file an appeal, but he did not learn of counsel's ineffective assistance until two and a half years

[7] Jimenez did not act with appropriate diligence to keep advised of his appeal. According to Jimenez, he received no information about his appeal from his appointed counsel from the filing of the notice of appeal in January 1996 through the filing of the *Anders* brief in July 1996. *See* CCR.48. But Jimenez did not attempt to contact the court to learn the status of his appeal until September 1997, approximately 20 months after his appeal commenced. *See* CCR.27. Jimenez's prolonged delay in seeking information about the status of his appeal is inconsistent with AEDPA's mandate that inmates act diligently to preserve their rights.

later); *DiCenzi v. Rose*, 452 F.3d 465, 469-72 (6th Cir. 2006) (recognizing that § 2244(d)(1)(D) applied when an inmate's counsel was ineffective by not advising him of his appeal rights); *cf. Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000) (holding that § 2255(f)(4)—§ 2244(d)(1)(D)'s counterpart provision applicable to federal convictions—provided a later limitations start date when an inmate's counsel failed to file his appeal and the inmate exercised due diligence to discover this failure five months later).

Section 2244(d)(1)(D) addresses the practical problem that arises when a defendant reasonably presumes that his counsel is pursuing an appeal, but in fact the attorney has failed to do so—for example, by failing to file a brief or a notice of appeal.[8] In those cases, even the diligent inmate may not be aware of these facts until after the state-court conviction "became final" under § 2244(d)(1)(A) when the time to file the appeal or seek further review expired. Thus, § 2244(d)(1)(D) would provide a later state date.

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[8] Jimenez's *amici* assert that the ineffective assistance of his counsel was symptomatic of Texas's indigent-defense system. *See* Brief for *Amici Curiae* Texas Fair Defense Project and Texas Criminal Defense Lawyers Association, at 6-10. But as *amici* properly note, *id.* at 16, the Texas Court of Criminal Appeals has acted to address this form of ineffective assistance of counsel. Now, under Texas Rule of Appellate Procedure 25.2(d), the *trial court* must advise the inmate of "his rights concerning an appeal, as well as any right to file a *pro se* petition for discretionary review." TEX. R. APP. P. 25.2(d).

Regarding the claims raised in Jimenez's federal habeas petition—judicial bias and ineffective assistance in his probation-revocation proceedings—Jimenez could have invoked § 2244(d)(1)(B). Section 2244(d)(1)(B) provides a later limitations start date when a state-created impediment prevents the timely filing of federal claims. *See* 28 U.S.C. § 2244(d)(1)(B). Jimenez was not provided timely notification that his appeal was dismissed because, through no fault on Jimenez's part, the notice was sent to the wrong address. Any later limitations start date under § 2244(d)(1)(B), however, would also have begun no later than September 1997, when Jimenez learned that his appeal was dismissed.

B. Because Jimenez Was Not Diligent in Seeking Postconviction Relief, He Failed to Meet Any Applicable Limitations Period Under § 2244(d)(1).

After learning that his state appeal was dismissed, Jimenez inexplicably waited four and a half years, until April 2002, to seek postconviction relief. J.A. 23, 77; Pet. Br. 6. Under § 2244(d)(1) (B) or (D), the one-year limitations period for Jimenez to file a federal habeas claim ended in September 1998. Jimenez could have tolled this limitations period if he had filed an application for state postconviction relief any time during the year following his discovery that he had lost the opportunity to file his own state

appeal due to ineffective assistance of counsel. *See* 28 U.S.C. § 2244(d)(2). Not only did he fail to do so, but he waited 54 months to seek such relief. J.A.23, 77. That considerable delay foreclosed his opportunity to seek federal habeas review.

The explanation Jimenez has offered for belatedly asserting his rights is that he was an unsophisticated inmate proceeding *pro se*. Pet. Br. 7 n.2; *see also* J.A.109-14. But the Court has expressly rejected this explanation as an excuse for unreasonable delay in meeting AEDPA's limitations periods. *See Johnson v. United States*, 544 U.S. 295, 311 (2005) (holding that inmate's 21-month delay in attacking his sentence enhancement through state habeas "fell far short of reasonable diligence" and rejecting inmate's excuse "that he was acting *pro se* and lacked the sophistication to understand the procedures"). Jimenez's 54-month delay is no more excusable than the 21-month delay in *Johnson*.

II. JIMENEZ'S INTERPRETATION OF § 2244(d)(1)(A) IS INCONSISTENT WITH AEDPA'S TEXT AND STRUCTURE.

Because Jimenez waited 54 months before seeking relief on his ineffective-assistance claim, the limitations period for federal habeas review expired under § 2244(d)(1). *See supra* Part I. Jimenez challenges that result, and the lower courts' decisions in this case, by interpreting § 2244(d)(1)(A) to

contemplate multiple points when finality attaches to a state-court judgment. Pet. Br. 33-37. But this interpretation of § 2244(d)(1)(A) is inconsistent with the text and structure of the statute, which contemplates a single finality date under § 2244(d)(1)(A), subject to later limitations start dates for claims falling within the exceptions reflected in § 2244(d)(1)(B)-(D).

A. Section 2244(d)(1)(A)'s Text Does Not Allow for Multiple Finality Dates for State-Court Judgments.

Jimenez's primary argument that § 2244(d)(1)(A) contemplates multiple finality dates turns on analogizing it to other instances when the finality of a judgment is suspended, particularly: (1) when the actions of a lower court or party reset the 90-day period to file a petition for a writ of certiorari, Pet. Br. 33-34; and (2) when a court "reopens" the time to appeal under a rule like Texas Rule of Appellate Procedure 26.3 or Federal Rule of Appellate Procedure 4(b)(4), Pet. Br. 34, 36-37. Neither analogy supports his argument.

1. Resetting the deadline to file a petition for a writ of certiorari is not analogous to calculating when a judgment became final under § 2244(d)(1)(A).

Jimenez's comparison of the timeliness of petitions for writs of certiorari, governed by 28 U.S.C.

§ 2101(c), and the operation of § 2244(d)(1)(A) ignores important differences in their language. Section 2101(c) provides that the 90 days to file a certiorari petition begins to run from "the *entry* of [the] judgment or decree." 28 U.S.C. § 2101(c) (emphasis added). But because the judgment can potentially be altered after it is entered—through rehearing sought by the parties or initiated by the court of appeals—it is possible that (1) the judgment ultimately reviewed by the Court will be different; or (2) the parties' rights will be altered, which may affect whether they seek certiorari review.

Accordingly, the Court has defined "entry of such judgment" in § 2101(c) through its Rule 13.3, as well as *Hibbs v. Winn*, 542 U.S. 88, 97-98 (2004), to occur only after the risk of altering the judgment has passed—*i.e.*, only when there is "a genuinely final judgment." *Id.* at 98.

But "final judgment" under § 2244(d)(1)(A) needs no such definition by rule or case law because Congress has already defined it in this context: the limitations period runs from when the judgment becomes final "by the conclusion of direct review or the expiration of the time for seeking such review." This definition ensures that the limitations period will not begin to run until the risk of altering the judgment through the usual direct-review process is exhausted. For example, this definition—unlike the language of § 2101(c)—accounts for a request for rehearing from a state court because, while that request is pending, neither the "conclusion of direct

review" nor "the expiration of the time for seeking such review" will occur. Thus, the additional definition that the Court has given to § 2101(c) would be redundant here.[9]

Jimenez essentially argues that the Court should add to Congress's definition of a final judgment in § 2244(d)(1)(A)—much the way it further defined "entry of such judgment" in § 2101(c)—by holding that out-of-time appeals suspend a judgment's finality. But the situations are not analogous. Because petitions for rehearing are a usual feature of circuit-court practice, the Court reasonably defined "entry of judgment" in § 2101(c) to accommodate this standard procedure. By contrast, out-of-time appeals are not such an ordinary feature of state criminal appeals that the Court should alter Congress's explicit definition of when a judgment becomes "final"—particularly when Congress has already provided a mechanism to address justifiably untimely

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[9] Jimenez's reliance on *Limtiaco v. Camacho*, 127 S. Ct. 1413 (2007), *see* Pet. Br. 33-34, is also misplaced. In *Limtiaco*, a party timely appealed to an intermediate court that later dismissed the appeal when Congress divested the court of its appellate jurisdiction. 127 S. Ct. at 1417. Concluding that the case's pendency in the intermediate court suspended the judgment's finality for purposes of calculating the certiorari deadline, the Court appropriately noted that "our holding is limited to the unique procedural circumstances presented here." *Id.* at 1418. Even if *Limtiaco* could generally be extended beyond its peculiar facts, the circumstances here are so dissimilar that the analogy is inapt.

appeals in the same statute (for example, in § 2244(d)(1)(D)). *See supra* Part I.

2. An extension of the time to file a direct appeal under state or federal appellate rules is not analogous to postconviction relief permitting an out-of-time appeal.

Jimenez suggests that granting an out-of-time appeal through intervening postconviction proceedings years after a state-court conviction became final under § 2244(d)(1)(A) is no different than extending the deadline to file a notice of appeal under rules such as Texas Rule of Appellate Procedure 26.3 or Federal Rule of Appellate Procedure 4(b)(4). *See* Pet. Br. 24, 34. Classifying both situations as ones in which a court "exercises its discretion to reopen the time to appeal," he reasons that, if a conviction is not treated as final under § 2244(d)(1)(A) when an appeal is filed within a deadline extended under these rules, a conviction is likewise not final when an out-of-time appeal is granted as postconviction relief. *Id.*

But Jimenez's analogy rests on a mischaracterization of these rules' purpose and effect. The rules permit courts to *extend* the time to perfect an appeal by a short period that immediately follows the initial period during which a defendant may appeal. *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996) (not only must extension motion be

filed "within 15 days after the deadline for filing the notice of appeal," but the notice of appeal *itself* must be filed "within fifteen days of the last day allowed for filing"); FED. R. APP. P. 4(b)(4) (extended period for filing notice cannot "exceed 30 days from the expiration of the time otherwise prescribed"). That is, the time for appealing does not close and then "reopen" under these rules, as Jimenez suggests. Pet. Br. 34.[10]

This distinction manifests in how courts describe the timeliness of appeals filed in these different circumstances. When a court extends the time to file a notice of appeal, the notice is considered "timely." *See Olivo*, 918 S.W.2d at 522 (holding that "a late notice of appeal may be considered timely" if the court grants a properly filed Rule 26.3 motion); *United States v. Nichols*, 534 F.2d 202, 204 (9th Cir. 1976) (per curiam) (stating that, when district court properly grants a Rule 4(b) motion, "the appeal is timely"); *cf. Young v. Harper*, 520 U.S. 143, 147 n.1 (1997) (holding that "both the petition for rehearing and the subsequent petition for certiorari were timely

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[10] The distinction is also apparent from the fact that Federal Rule of Appellate Procedure 4(a) (which governs civil cases) uses both the term "extending" the time to file a notice of appeal and the term "reopening" the time to file an appeal, indicating that these are two distinct concepts. *Compare* FED. R. APP. P. 4(a)(5) (court can "extend" time to file notice of appeal for 30 days after initial appeal deadline), *with* FED. R. APP. P. 4(a)(6) (court can "reopen" time to appeal upon motion filed within six months of judgment if party did not receive notice of judgment).

filed" because the court of appeals extended the time for filing a petition for rehearing under Federal Rule of Appellate Procedure 40(a)). By contrast, when a court "reopens" a long-expired period to appeal through postconviction relief, the resulting "delayed," "belated," or "out of time" appeal is, by definition, untimely.[11]

Because an appeal filed within an extended deadline is considered timely filed in the first instance, direct review has not concluded, nor has the time for seeking direct review expired. Consequently, the judgment being appealed is not final under § 2244(d)(1)(A), and the federal habeas limitations period has not started.

But because an out-of-time appeal like Jimenez's is not considered timely, the time for seeking direct review necessarily has elapsed. Moreover, an out-of-time appeal results from postconviction or

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[11] Jimenez's misunderstanding of Texas Rule of Appellate Procedure 26.3 as "reopening" an appeal mirrors his misperception of other States' similar rules, which he views as permitting "reinstated" appeals. Pet. Br. 24. But most of the rules Jimenez cites, like Texas's Rule 26.3, simply authorize short extensions of time to file notices of appeal. *E.g.*, COLO. R. APP. 4(b)(1); HAW. R. APP. P. 4(b)(5); ILL. SUP. CT. R. 606(c); MASS. R. APP. P. 4(c); N.D. R. APP. P. 4(b)(4); N.J. CT. R. 2:4-4(a); UTAH R. APP. P. 4(e). These rules, like Rule 26.3, do not "reopen" or "reinstate" an appeal. Indeed, only one rule cited by Jimenez indicates that an appeal is "reinstated" or "reopened," *see* OHIO R. APP. P. 26(B)(2)(b), and that rule functions as part of Ohio's postconviction proceedings for AEDPA's purposes, not part of its direct-review framework. *Lopez v. Wilson*, 426 F.3d 339, 352 (6th Cir. 2005).

collateral-review procedures that *presuppose* the conclusion of direct review. Thus, when an out-of-time appeal is granted, the time for direct review has already expired—which means that the judgment has become final under § 2244(d)(1)(A) and the federal habeas limitations period has commenced. And because nothing in § 2244(d)(1)(A) suggests that "the 'conclusion of direct review' in state court can happen twice (or more often)" in the same case, *Teas v. Endicott*, 494 F.3d 580, 581 (7th Cir. 2007), an out-of-time appeal does not "restart" § 2244(d)(1)(A)'s deadline.[12]

B. The "Conclusion of Direct Review" and "the Expiration of Time for Seeking Such Review" Cannot Both Occur in the Same Case.

Jimenez also argues that the use of the disjunctive "or" in § 2244(d)(1)(A)'s reference to "the conclusion of direct review *or* the expiration of the

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[12] Jimenez inaccurately describes § 2244(d)(1)(B)-(D) as "break[s] in the 'linear' progression of the federal limitations period," which he cites as evidence that § 2244(d)(1)(A)'s alternative finality dates contemplate similar breaks in the limitations period. *See* Pet. Br. 35-36. But § 2244(d)(1)(B)-(D) do not change the "pinpoint" date when the state-court judgment "became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Rather, they provide start dates *later* than § 2244(d)(1)(A)'s finality date based on circumstances beyond the inmate's control.

time for seeking such review," indicates that Congress intended to ensure that the limitations period would run from the *later* of these two events. Pet. Br. 35. But this construction is likewise untenable.

First, by suggesting that one of these events—"the conclusion of direct review" or "the expiration of the time for seeking such review"—will happen later than the other, Jimenez incorrectly presumes that both events ordinarily occur in the same case. They do not. If "direct review" reaches its "conclusion"—*i.e.*, the inmate pursues direct review until this Court denies the inmate's certiorari petition or grants the petition and affirms the conviction—it follows that the inmate never allowed the "time for seeking such review" to expire. But if the inmate stops seeking direct review before filing a certiorari petition, then direct review does not reach its "conclusion," and the "time for seeking such review" expires at the filing deadline for the next stage of review. *Day v. McDonough*, 547 U.S. 198, 203 (2006) (because inmate did not seek certiorari review of the final state-court decision on direct appeal, federal habeas limitations began running from the expiration of time to seek certiorari review); *Roberts*, 319 F.3d at 694 ("If the defendant stops the appeal process before [the certiorari stage], the conviction becomes final when the time for seeking further direct review in the state court expires.").

Second, although adding words to a statute to reach a certain interpretation is disfavored, *see Mayle*, 545 U.S. at 661 n.6, Jimenez's argument

effectively inserts the words "whichever is later" into § 2244(d)(1)(A). *See* Pet. Br. 35. Jimenez apparently believes that this language is implicit in the statute because Congress could not have intended that the limitations period run from the *earlier* of the "conclusion of direct review or the expiration of the time for seeking such review." Pet. Br. 35 n.13. This reasoning fails, however, because it still incorrectly presumes that both events occur in the same case, and that it is therefore necessary to read the qualifier "whichever is later" into the statute.

Rather, as noted above, § 2244(d)(1)(A) refers to two mutually exclusive events, only one of which occurs in a case: if direct review reaches a conclusion, the time for seeking direct review necessarily never expired; but if the inmate does not pursue direct review to its conclusion, he allows the time to seek review to expire at an earlier stage. Because only one of these two conditions will occur, it is not necessary to read "whichever is later" into the statute.

And Jimenez cannot support his interpretation by arguing that the phrase "the latest of" in § 2244(d)(1) modifies the two events listed in § 2244(d)(1)(A). *See* Pet. Br. 36. That phrase applies to the four events listed in § 2244(d)(1)(A)-(D). The relevant event in § 2244(d)(1)(A) is when the judgment becomes final. The phrase "by the conclusion of direct review or the expiration of the time for seeking such

review" simply "spell[s] out the meaning of 'final' in § 2244(d)(1)(A)." *Clay*, 537 U.S. at 530.[13]

Anticipating these problems with his interpretation of § 2244(d)(1)(A), Jimenez argues that both "the conclusion of direct review" and "the expiration of the time for seeking such review" actually do occur in the same case, albeit "uncommon[ly]." *See* Pet. Br. 35-36. As examples, Jimenez cites cases in which an inmate's direct appeal failed due to ineffective assistance of counsel, and the inmate ultimately obtained a remedy in state court that resembles or recreates direct-appeal review. *See id.*

But, for several reasons, the Court should not stretch the language of § 2244(d)(1)(A) to reach "uncommon" cases like Jimenez's. First, doing so would cast aside the uniform federal rule for finality under § 2244(d)(1)(A), described in *Clay*, in favor of a rule that assesses finality based on rules that vary from State to State concerning the appropriate remedy for an inmate's lost appeal rights due to ineffective assistance of counsel. *See infra* Part II.C.

Second, Jimenez's theory is based on the notion that, when an out-of-time appeal is granted, the "conclusion of direct review" will occur later than "the

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[13] The Third Circuit has rejected a similar construction. *Fielder v. Varner*, 379 F.3d 113, 118 (3d Cir. 2004) (holding that the phrase "the latest of" in § 2244(d)(1) cannot be read into one of that provision's subsections, § 2244(d)(1)(D)).

expiration of the time for seeking such review." *See* Pet. Br. 35-36. But if this proposition could ever be true, it certainly would not be true in any case in which an inmate's out-of-time appeal is unsuccessful and the inmate either fails to seek further discretionary review in the State's highest court or fails to seek certiorari review in this Court. Direct review only "concludes" when the Court denies a certiorari petition or affirms or denies the lower court on certiorari review; otherwise finality attaches when the time for seeking review at an earlier stage expires. *See Clay*, 537 U.S. at 527, 531; *Roberts*, 319 F.3d at 694; *Bridges*, 284 F.3d at 1202.

Thus, under Jimenez's theory, whenever an inmate's out-of-time appeal is unsuccessful and he either fails to seek further review in state court or fails to seek certiorari review in this Court, what would actually occur is not the "conclusion of direct review" years after "the expiration of the time for seeking such review"—as suggested by Jimenez. Rather, in these circumstances "the time for seeking [direct] review" will expire *twice* in the same case. There is nothing in § 2244(d)(1)(A)'s language indicating that Congress intended this result. And Jimenez's textual fix—reading the phrase "whichever is later" into § 2244(d)(1)(A)—does not even address this problem.

Third, another unworkable but necessary consequence of Jimenez's interpretation is that the limitations period under § 2244(d)(1)(A) will never begin to run so long as an out-of-time appeal remains

a possibility in state court. Direct review will not conclude (because it never started) and the time for seeking such review will not expire (because the inmate still has time to seek an out-of-time appeal). Congress surely did not intend a statute designed to "promote judicial efficiency" and to "safeguard[] the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh," *Day*, 547 U.S. at 205-06, to place § 2244(d)(1)(A)'s limitations period in "limbo" whenever an out-of-time appeal might, at some later date, be granted by a state court.[14]

Finally, Jimenez's theory illogically assumes that Congress crafted § 2244(d)(1)(A), the background rule for finality under § 2244(d)(1), to address the *exception* that arises when an inmate learns months

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[14] In many States, out-of-time appeals may be obtained through postconviction or other collateral proceedings that are not subject to filing deadlines. *See, e.g.*, ARIZ. R. CRIM. P. 32.4(a) (Rule 32.1(f) claims not subject to limitations); COLO. REV. STAT. ANN. § 16-5-402 (no time limit for collaterally attacking class-one felonies); NEB. REV. STAT. ANN. § 29-3001 (motion for postconviction relief may be filed at any time); N.D. CENT. CODE § 29-32.1-03(2) (postconviction proceedings may be commenced at any time); S.D. CODIFIED LAWS § 21-27-3.1 (habeas application permitted at any time); *Hudson v. State*, 603 S.E.2d 242, 243 (Ga. 2004) ("mere passage of time [does] not preclude a defendant from pursuing an out-of-time appeal" (internal citation and quotation marks omitted)); *see also* IND. POST-CONVICTION R. 2 § 3 (no specific deadline, but rule requires diligence); *cf.* MD. CRIM. PROC. CODE § 7-103 (in non-capital cases, permitting ten years to file postconviction petition, and longer when extraordinary cause is shown).

or years later that his direct appeal failed due to ineffective assistance of counsel. *Cf. Panetti v. Quarterman*, 127 S. Ct. 2842, 2853 (2007) (noting that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here"). Because Congress anticipated exceptional circumstances that might prevent an inmate from timely filing a federal habeas petition, and it carved out specific exceptions for those circumstances in § 2244(d)(1)(B)-(D), there is no reason to believe that Jimenez's strained interpretation of § 2244(d)(1)(A) reflects Congress's intent.[15]

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[15] Jimenez also argues that, when Congress enacted AEDPA, "it was well established that the 'conclusion of direct review' would sometimes post-date the 'expiration of time for seeking such review' . . . in ineffective assistance of counsel cases under the aegis of this Court's 1969 and 1985 decisions in *Rodriquez* [*v. United States*, 395 U.S. 327 (1969),] and *Evitts* [*v. Lucey*, 469 U.S. 387 (1985)]." Pet. Br. 36-37.

But neither decision supports his interpretation of § 2244(d)(1)(A). First, in neither case was the remedy at issue. Rather, in both cases, the Court's point was simply that inmates required some method to vindicate their appellate rights when their criminal appeals were frustrated by ineffective counsel. The Court was not addressing whether that method would constitute "direct review." Because this remedy issue was a minor point in both cases, it is highly unlikely that these cases somehow informed Congress's drafting of § 2244(d)(1)(A).

And even if Congress considered these cases, they would not have been examples of the "conclusion of direct review" and "expiration of the time for seeking direct review" occurring in the same case for federal habeas purposes. In *Rodriquez*, the inmate was "resentenced." 395 U.S. at 332. And in *Evitts*, the

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C. Jimenez's Interpretation of § 2244(d)(1)(A) Rests on a Mischaracterization of the States' Various Remedies for Ineffective Assistance of Counsel on Appeal.

Jimenez asserts that "both state and federal courts commonly reinstate direct appeals when the right to appeal was lost as a result of constitutionally ineffective assistance of counsel." Pet. Br. 25-26. He further asserts that, whenever this occurs, the federal limitations period under § 2244(d)(1)(A) "restarts." *See* Pet. Br. 34-36.

This argument suffers from three related flaws. First, although Jimenez aggregates the various procedures that States use to remedy ineffective assistance on appeal into the generic category "reinstated appeals," Pet. Br. 4 n.1, those procedures actually vary considerably from State to State—and most of them do not, in fact, "reinstate" a prior appeal. Second, many States award out-of-time appeals through collateral-review procedures which, under foundational principles of criminal procedure, typically commence after an inmate's "direct review" proceedings ended. Jimenez's theory requires that these principles be turned upside down, such

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examples of postconviction relief cited involved vacating the judgment and entering a new one. 469 U.S. at 399 n.10. In both cases, the new judgments would have started a new clock for federal habeas; these would not have been cases where "the judgment became final" both by the "conclusion of direct review" and the "expiration of the time for seeking such review" in the same case.

that—for purposes of out-of-time appeals under § 2244(d)—"collateral review" will end before "direct review" begins. Finally, because Jimenez interprets § 2244(d)(1)(A)'s finality date to turn on whether the State's procedure functions like "direct review," Pet. Br. 27-32, the differences in those procedures (which he ignores) would manifest in different finality determinations in different States' federal courts. That result defeats Congress's very purpose in defining finality in § 2244(d)(1)(A): to establish a "uniform federal rule" for limitations. *Clay*, 537 U.S. at 531.

1. Procedures for remedying ineffective assistance of counsel on appeal vary considerably among the States.

Jimenez's repeated use of the term "reinstated appeals" fails to acknowledge the varying remedies actually afforded by States when inmates receive ineffective assistance of appellate counsel. Indeed, Jimenez ignores diverse state practices regarding what relief is available and how it may be sought.

States provide a broad array of remedies for ineffective assistance of counsel on appeal, some of which resemble the out-of-time appeals used in Texas, but many of which function quite differently.[16]

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[16] Jimenez's assertion that his own out-of-time appeal "reinstated" his prior appeal is also incorrect. In fact, it afforded him significantly broader appellate rights than he was entitled to when his initial appeal failed. Whereas his initial appeal

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Jimenez references 17 States that he believes commonly "reinstate" direct appeals, Pet. Br. 25-26, 26 n.11, but the vast majority of his cited cases do not purport to "reinstate" the inmate's initial appeal.[17] To "reinstate" an appeal, States presumably would reopen the old case, with the same cause number, at the point when the ineffective assistance of counsel occurred.[18] But the majority of the cases cited by Jimenez explain that the relief granted is a new appeal—not a "reinstated" appeal.[19] Indeed, *State v.*

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would have been limited to jurisdictional errors, his out-of-time appeal commenced shortly after Texas law had changed in his favor, allowing him to raise his claims that judicial bias and ineffective assistance of counsel affected his sentence. *See supra* n.3 and accompanying text. Thus, Jimenez profited from his own lack of diligence.

[17] In several decisions cited by Jimenez, the courts awarded no appeals at all. Rather, they remanded for a determination whether there was an ineffective-assistance violation. *See Kargus v. State*, 162 P.3d 818, 831 (Kan. 2007); *State v. Long*, 126 P.3d 284, 287 (Colo. Ct. App. 2005); *Foote v. State*, 751 P.2d 884, 887 (Wyo. 1988); *Barnett v. State*, 497 So. 2d 443, 444 (Miss. 1986). And another provided no relief because the court found that there had been no ineffective assistance of counsel. *State v. Gross*, 760 A.2d 725, 742-43, 773 (Md. Ct. Spec. App. 2000).

[18] The only jurisdiction cited by Jimenez that "reinstates" appeals when there has been ineffective assistance of counsel does so by requiring the court of appeals to accept as timely the inmate's previously refused notice of appeal—not by initiating a brand new appeal. *See Estep v. People*, 753 P.2d 1241, 1248-49 (Colo. 1988).

[19] *Wallace v. State*, 121 S.W.3d 652, 656, 660 (Tenn. 2003) ("delayed appeal"); *State v. Stubblefield*, 97 S.W.3d 476, 477 (Mo. 2003) (per curiam) (providing "a new period for filing an appeal"); *Loop v. Solem*, 398 N.W.2d 140, 143 (S.D. 1986)

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McCracken directly refutes Jimenez's argument, expressly stating that the remedy for ineffective assistance of counsel on appeal is not to "reinstate a past [appeal]," but rather to grant a new one. 615 N.W.2d 902, 914 (Neb. 2000) (cited at Pet. Br. 26 n.11).

Other cases referenced by Jimenez likewise demonstrate that the remedy provided is not properly termed a "reinstated appeal." *See, e.g.*, *Middlebrook v. State*, 815 A.2d 739, 742-43 (Del. 2003) (courts can either (1) vacate the underlying sentence, necessarily creating a new judgment with new appellate deadlines, or (2) permit the issues that would have been raised on direct appeal to be raised in a postconviction proceeding); *State v. Tweed*, 59 P.3d 1105, 1110 (Mont. 2002) (an out-of-time appeal is proper when the ineffective assistance was the failure to file a notice of appeal or an appellate brief, but a petition is proper when the appellate attorney abandons the appeal by withdrawing the notice of appeal); *Ponder v. State*, 400 S.E.2d 922, 923-24 (Ga. 1991) (the granting of an out-of-time appeal actually permits the inmate a limited time to pursue *even broader relief* than he could have sought in a timely

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(permitting "a new appeal" to run following resentencing); *Gross*, 760 A.2d at 755 (Maryland) ("belated appeal"); *State v. Trowell*, 739 So. 2d 77, 78 (Fla. 1999) (same); *Davis v. State*, 877 S.W.2d 93, 94 (Ark. 1994) (per curiam) (same); *Young v. State*, 902 P.2d 1089, 1091 (Okla. Crim. App. 1994) ("out-of-time appeal"); *Barnett*, 497 So. 2d at 444 (Mississippi) (same); *State v. Counterman*, 475 So. 2d 336, 338, 340 (La. 1985) (same); *Ex parte Sturdivant*, 460 So. 2d 1210, 1211 (Ala. 1984) (same).

direct appeal, specifically allowing him to pursue postconviction remedies, including a motion for new trial); *Foote*, 751 P.2d at 887 (if the trial court finds that counsel was ineffective, it may invoke the common-law writ of certiorari to review the case as a way to (1) avoid violating the jurisdictional requirement of a timely notice of appeal, and (2) not insist that a postconviction proceeding be pursued). These remedies cannot be fairly described as "reinstating" a direct appeal.

2. Jimenez's interpretation of § 2244(d)(1)(A) contravenes the fundamental principle of criminal procedure that the end of "collateral review" does not precede "direct review."

The majority of States referenced by Jimenez afford out-of-time appeal remedies for ineffective assistance of counsel solely or primarily through postconviction procedures.[20] Jimenez argues that

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[20] State habeas proceedings are used in four States. *Kargus*, 162 P.3d at 820 (Kansas); *Stubblefield*, 97 S.W.3d at 477 (Missouri); *Trowell*, 739 So. 2d at 78-79 (Florida); *Ponder*, 400 S.E.2d at 923 (Georgia). Petitions or motions for postconviction relief are used in five States. *Long*, 126 P.3d at 285 (Colorado); *Wallace*, 121 S.W.3d at 655 (Tennessee); *Gross*, 760 A.2d at 773 (Maryland); *McCracken*, 615 N.W.2d at 910 (Nebraska); *Counterman*, 475 So. 2d at 340 (Louisiana).

Other States use different postconviction procedures. *Davis*, 877 S.W.2d at 94 (Arkansas) (motion for belated appeal in the Supreme Court, which was filed as a result of a *federal*

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these out-of-time appeals function as a part of these States' direct-review processes. *See* Pet. Br. 27-32.

But because they are derived from postconviction or other collateral-review procedures that presuppose the conclusion of direct review, they cannot be accurately characterized as part of a State's "direct review" process under § 2244(d)(1)(A). *See supra* Part II.A.2.[21] A bedrock principle of criminal procedure is

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habeas proceeding); *Sturdivant*, 460 So. 2d at 1211 (Alabama) (petition for writ of error *coram nobis*); *Barnett*, 497 So. 2d at 444 (Mississippi) (motion for out-of-time appeal); *Young*, 902 P.2d at 1089 (Oklahoma) ("Application for an Appeal Out of Time").

[21] Indeed, States commonly provide postconviction or other collateral-review procedures for the pursuit of an out-of-time appeal. *See supra* n.18; *see also, e.g.*, ALASKA STAT. § 12.72.010(9) (inmate may seek postconviction relief for ineffective assistance of appellate counsel); *People v. Ross*, 891 N.E.2d 865, 869, 874 (Ill. 2008) (ineffective-assistance-of-appellate-counsel claim reviewed in petition for postconviction relief under 725 ILL. COMP. STAT. 5/122-1); *Commonwealth v. Halley*, 870 A.2d 795, 798, 801 (Pa. 2005) (providing, as a postconviction remedy, reinstatment of the right to pursue a direct appeal); *Whiteman v. State*, 643 N.W.2d 704, 709, 712 (N.D. 2002) (new direct appeal sought through application for postconviction relief under N.D. CENT. CODE § 29-32.1); *State v. Knight*, 484 N.W.2d 540, 544 (Wis. 1992) (inmate deprived of effective assistance of appellate counsel may seek writ of habeas corpus); *State v. Weber*, 602 A.2d 963, 964 (Conn. 1992) (habeas petition available to seek new appeal); *Beasley v. State*, 883 P.2d 714, 717 (Idaho Ct. App. 1994) (claim of ineffective assistance of appellate counsel properly raised under postconviction procedures in IDAHO CODE § 19-4901); ARIZ. R. CRIM. P. 32.1(f) (if the failure to timely file notice of appeal is not the defendant's fault, he may seek

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that "postconviction review" procedures generally follow the conclusion of "direct review." *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) ("Postconviction relief is even further removed from the criminal trial than is discretionary direct review . . . It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction."). Although there are limited circumstances in which direct-review and collateral-review proceedings may proceed concurrently, the notion that "collateral review" of a conviction could end before "direct review" began is foreign to our jurisprudence.

Yet that is precisely how Jimenez argues that § 2244(d) should apply when an out-of-time appeal is granted. According to Jimenez, even when—as here—the underlying conviction remains in place (*i.e.*, the court does not order a new judgment when granting the out-of-time appeal), the new appellate path provided in the out-of-time appeal means that "collateral review" of the underlying conviction has ended and "direct review" has commenced or recommenced. *See* Pet. Br. 45-46. Because this construction of § 2244(d) contravenes the fundamental principle that the end of collateral

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postconviction relief); IND. POST-CONVICTION R. 2 § 3 (permitting petition in appellate court seeking a belated appeal).

review cannot *precede* direct review, it should be rejected.

3. Conditioning the limitations start date under § 2244(d)(1)(A) on the nature of these varying state procedures would undermine Congress's intent that the start date be defined by a uniform federal rule.

As noted above, the usual start date for the federal habeas limitations period is when the judgment "became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). In *Clay*, the Court explained that, if Congress had simply set the start date at when a judgment "became final," without elaboration, that "might have suggested that finality assessments should be made by reference to state-law rules that may differ from the general federal rule and vary from State to State." 537 U.S. at 530-31. But by "spell[ing] out" in § 2244(d)(1)(A) when a judgment became final, the Court observed, Congress intended to "make it clear that finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule." *Id.* at 530, 531.

Jimenez's argument would defy Congress's intent by interjecting "state-law rules that . . . vary from State to State" back into the § 2244(d)(1)(A) calculus. He insists that federal district courts conduct "an examination of state law" to determine "whether a

particular state [out-of-time appeal] proceeding is part of the state's system of 'direct review.'" Pet. Br. 19. In that inquiry, he would have a court defer to however a State has characterized its out-of-time appeal procedure. *Id.* at 27-29.

But if state law is inconclusive on that point, Jimenez would have the federal court probe the nature of the state procedure. *See* Pet. Br. 29-32. If the court concludes that the state procedure looks sufficiently like "direct review"—regardless of whether it is derived from collateral or other postconviction-review procedures—the inmate's federal habeas limitations period would restart under § 2244(d)(1)(A). Otherwise, the procedure is necessarily "collateral review," and the inmate's limitation period under § 2244(d)(1)(A) is calculated from the appeal deadline that his attorney missed or failed to relay. Thus, inmates in the same circumstances but in different States would have different federal habeas limitations periods depending on how the State chooses to remedy their ineffective-assistance claims.[22]

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[22] That is, Jimenez's interpretation creates an arbitrary distinction under which inmates who receive ineffective assistance of counsel will receive a "revived" start date under § 2244(d)(1)(A) when they obtain an out-of-time-appeal remedy, but similarly situated inmates will not enjoy this benefit in jurisdictions where the failure of appellate counsel is remedied by having the inmate's direct-appeal claims reviewed within a postconviction proceeding. *See, e.g.*, *Middlebrook*, 815 A.2d at 743 (Delaware's postconviction courts have the option to remedy

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III. The Lower Courts' Interpretation of § 2244(d) Serves All of AEDPA's Purposes and Ensures That Inmates Have a Fair Opportunity to Vindicate Their Constitutional Rights.

Jimenez complains that the lower courts' decisions are inconsistent with AEDPA's purposes—particularly its goal of furthering comity with state courts. Pet. Br. 41-46. But nothing about those courts' resolution of Jimenez's case, or their application of the Fifth Circuit's decision in *Salinas*, offends that goal. Indeed, *Salinas* promotes comity because it confirms that § 2244(d)(1)'s limitations period is tolled during all state-court proceedings associated with postconviction or collateral review.

A. Tolling Limitations Under § 2244(d)(2) During the Completion of an Out-of-Time Appeal That Was Secured Through State Collateral Procedures Helps Advance AEDPA's Purposes.

Comity in the context of habeas proceedings means to "reduce[] friction between the state and federal court systems by avoiding the 'unseem[liness]' of a federal district court's overturning a state court

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the ineffective assistance of appellate counsel by permitting the issues that could have been raised in an out-of-time appeal to be raised in a postconviction proceeding); *Tweed*, 59 P.3d at 1110 (when counsel abandons an appeal by withdrawing the notice of appeal, remedy is through postconviction petition).

conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (quoting *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982)). AEDPA furthers this goal by providing that federal habeas relief may not be granted unless the inmate has already exhausted state-court remedies. 28 U.S.C. § 2254(b).

There is some tension, however, between the goal of comity and AEDPA's equally important aim of securing the finality of state-court judgments within a reasonable time. Section 2244(d)'s provisions reflect Congress's intent to accomplish both goals by tempering a strict one-year limitations period in § 2244(d)(1) with § 2244(d)(2)'s tolling provision.

Section 2244(d)(1) "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review," and thus "quite plainly serves the well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). Section 2244(d)(2), which tolls § 2244(d)(1)'s limitations period during state postconviction or other collateral-review proceedings, "promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Id.* Thus, § 2244(d)(2) "balances the interests served by [§ 2254(b)'s] exhaustion requirement and [§ 2244(d)(1)'s] limitation period." *Id.* And, working together, § 2244(d)(1)'s limitations period and § 2244(d)(2)'s tolling provision, combined

with § 2254(b)'s exhaustion requirement, "encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible." *Id.* at 181.

In *Salinas*, the Fifth Circuit applied § 2244(d)(2) when the Texas Court of Criminal Appeals granted an out-of-time PDR as a remedy on state habeas review. *Salinas*, 354 F.3d at 430.[23] The Fifth Circuit reasoned that, because the out-of-time PDR was awarded as a result of the collateral-review process, the one-year limitations period in § 2244(d)(1) should be tolled under § 2244(d)(2) while the inmate pursued that relief. *Id.*

Under *Salinas*, when an inmate receives ineffective assistance of counsel on appeal and timely pursues his postconviction or collateral-review remedies in state court, the limitations period under § 2244(d)(1) will not commence until all state-court proceedings associated with that review have ended.[24] *Salinas* thus correctly applies § 2244(d)(2) to balance § 2244(d)(1)'s limitations period with § 2254(b)'s

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[23] In Texas, once an inmate's direct appeal has failed in an intermediate court of appeals, he can file a PDR. TEX. R. APP. P. 68. When an inmate fails to file a PDR, his conviction becomes final 30 days after the intermediate court of appeals' decision. *Roberts*, 319 F.3d at 694.

[24] In *Salinas*, the inmate did not invoke § 2244(d)(1)(B) or (D), but instead relied on § 2244(d)(1)(A) and equitable-tolling arguments. 354 F.3d at 429-32. Accordingly, the court did not consider whether § 2244(d)(1)(B) or (D) provided a later limitations start date. *See id.*

exhaustion requirement, "ensur[ing] that the state courts have the opportunity fully to consider federal law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Duncan*, 533 U.S. at 178-79.

B. Tolling Through the Completion of an Out-of-Time Appeal Is Consistent with § 2244(d)(2)'s Text.

Jimenez asserts that, regardless of whether it effectuates AEDPA's purposes, *Salinas*'s application of § 2244(d)(2) should be rejected because it is incompatible with the section's text. He argues that once an out-of-time appeal is granted in a postconviction proceeding, that proceeding is no longer "pending," and the out-of-time appeal cannot properly be considered further "post-conviction or other collateral review" under § 2244(d)(2). Pet. Br. 45-46.

Section 2244(d)(2)'s language does not compel the result that Jimenez urges. His argument might have more force if the statute tolled limitations while a properly filed application for state postconviction or other collateral "relief" or "writ" is pending. But § 2244(d)(2) actually tolls limitations while an application for state postconviction or other collateral "review" is pending. The term "review" is broader than "relief" or "writ." And when a state court grants an application for an out-of-time appeal,

postconviction or collateral "review" is ongoing with respect to "the pertinent judgment" because that judgment is still being reviewed by the state courts, albeit in a separate proceeding.

Jimenez resists this conclusion, contending that a reinstated appeal "is no more a part of the state habeas process than a new state trial is part of the federal habeas process when ordered by a federal district court." Pet. Br. 46. But a new trial, necessarily predicated on vacating the pertinent judgment under which an inmate has been confined, is substantially different than an out-of-time appeal that does not disturb the judgment but merely provides a new appellate path to challenge that judgment. When collateral review results in a new trial, or even just a new judgment, then the "pertinent judgment" that was the subject of the collateral review no longer exists, and thus it is accurate to say that the application for collateral review is no longer pending. The vacatur of the judgment does in fact place the inmate back in a direct-review posture because the judgment under collateral attack no longer exists.

Further, for AEDPA's purposes, out-of-time appeals must be considered either part of a State's direct-review process or its collateral-review process. They are best understood as part of the latter. Although AEDPA does not define the term "direct review," the term "direct" has been defined as "extending or moving from one place to another by the shortest way without changing direction or

stopping"; "without intervening factors or intermediaries." THE NEW OXFORD AMERICAN DICTIONARY 483 (2001). And there is nothing "direct" about an out-of-time appeal obtained through postconviction or other collateral-review proceedings. Rather, these out-of-time appeals necessarily involve intervening habeas or other postconviction proceedings and are awarded as a method of relief associated with that collateral review. *E.g.*, *O'Neal v. Kenny*, 501 F.3d 969, 970-71 (8th Cir. 2007); *Salinas*, 354 F.3d at 430.[25]

For these reasons, out-of-time appeals awarded through postconviction or collateral review are not part of the "direct review" process under AEDPA and cannot "restart" § 2244(d)(1)(A)'s limitations period. *See Salinas*, 354 F.3d at 430 ("If . . . an 'out of time'

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[25] Jimenez also complains that *Salinas*'s tolling rule purportedly "would not apply in states that reinstate appeals outside of habeas," forcing inmates to file federal habeas petitions "while their reinstated appeals remained under consideration." Pet. Br. 46. But this concern is misplaced. Jimenez presumes that tolling under § 2244(d)(2) would apply only when an out-of-time appeal is awarded through a proceeding denominated as "habeas." But the statute's text contains no such limitation. Rather, the "properly filed application for State post-conviction or other collateral review" referenced in § 2244(d)(2) fairly encompasses the variety of terms that States use "to represent the different forms of collateral review that are available after a conviction." *Duncan*, 533 U.S. at 177. Jimenez's unduly narrow construction of § 2244(d)(2) fails to recognize that the limitations period is tolled not only for "habeas" proceedings, but for any "collateral review" proceedings permitted under state law.

PDR is awarded only as a result of the collateral review process, limitations is tolled merely while the petitioner seeks to obtain that relief.");[26] *see also O'Neal*, 501 F.3d at 970-71 (holding that a new direct appeal awarded as part of state postconviction relief did not "restart" the limitations period under § 2244(d)(1)(A)); *Teas*, 494 F.3d at 582 (holding that a belated "direct" review granted as relief on collateral review did not renew the limitations period under § 2244(d)(1)(A)).[27] Rather, being part of collateral review, such out-of-time appeals toll the applicable limitations period until they are finally resolved. *See* 28 U.S.C. § 2244(d)(2); *Salinas*, 354 F.3d at 430.

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[26] Jimenez suggests that the text of § 2244(d)(1)(A) provides no support for *Salinas* on this point because the statute refers only to the "conclusion of direct review," making no mention of "how the defendant secured the right to pursue that direct review." Pet. Br. 37-38. But the term "*direct* review" itself suggests the ordinary course of review by succeeding higher courts through proceedings in the Supreme Court. It does not naturally contemplate review "secured" through some collateral or extraordinary process. *Cf. O'Sullivan*, 526 U.S. at 845 (holding that § 2254(c)'s exhaustion requirement mandates that the petitioner seek discretionary review in a State's supreme court because such a petition "is a normal, simple, and established part of the State's appellate review process").

[27] *Contra Frasch v. Peguese*, 414 F.3d 518, 521-25 (4th Cir. 2005) (holding that an out-of-time appeal obtained through postconviction proceedings was nonetheless "direct review" for purposes of § 2244(d)(1)(A) and "restarted" § 2244(d)(1)(A)'s limitations period); *Orange v. Calbone*, 318 F.3d 1167, 1170-71 (10th Cir. 2003) (same).

In this regard, *Salinas's* application of § 2244(d)(2) heeds the Court's guidance that the statute should be interpreted broadly to effect AEDPA's goal of comity—*i.e.*, giving the States the opportunity to address constitutional error in the first instance. In *Carey v. Saffold*, for example, the Court applied this principle when it held that an application for state collateral review was "pending" under § 2244(d)(2) in the time interval between a lower court's disposition of the application and the filing of an appeal from that disposition—even though, strictly speaking, no application is "pending" before any court during that interval. 536 U.S. 214, 219-21 (2002). And the Court extended this interpretation to California's postconviction system, in which inmates file new "original" writs—as opposed to appeals—in higher courts. *Id.* at 221-25. This reading carried out AEDPA's purpose of "giv[ing] States the opportunity to complete one full round of review, free of federal interference." *Id.*

Carey shows that a reasonable reading of § 2244(d)(2) that fulfills AEDPA's purposes is preferable to a hyper-technical reading that thwarts those purposes. The same principle applies here. The Fifth Circuit's interpretation of § 2244(d)(2) is consistent with AEDPA's framework and goals. It properly applies AEDPA's requirement that an inmate act promptly and diligently once he learns of his ineffective-assistance claim, thereby avoiding unnecessary delay, promoting judicial efficiency, and securing the finality of state-court judgments within a reasonable time. *See Day*, 547 U.S. at 205-06. At the

same time, this reading also meets AEDPA's comity goal by tolling the federal limitations period until all state proceedings addressing the inmate's claims have been exhausted. *Duncan*, 533 U.S. at 179. And because it fulfills AEDPA's goals while still allowing inmates a full and fair opportunity to obtain first federal habeas review, it respects the rights of inmates like Jimenez.

IV. A CERTIFICATE OF APPEALABILITY SHOULD NOT HAVE ISSUED IN THIS CASE.

Although the dispute underlying this case concerns the calculation of § 2244(d)(1)'s limitations period, the question presented is whether Jimenez was entitled to a certificate of appealability (COA). *Jimenez v. Quarterman*, 128 S. Ct. 1646 (2008). He was not.

Because the district court denied Jimenez's habeas petition solely on procedural grounds, *see* J.A.80-93, a COA should have issued only if Jimenez had shown that "jurists of reason would find it debatable" whether (1) the district court's procedural ruling was correct; and (2) his petition stated a valid constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Jimenez made neither showing.

A. Circuit Precedent Established That Jimenez's Claims Were Time-Barred.

Jimenez's federal habeas petition "d[id] not argue that [§ 2244(d)(1)'s] one-year limitations period was

triggered by the circumstances listed in Sections 2244(d)(1)(B), (C), or (D)." J.A.82. Rather, it asserted that "because he was granted permission to file an out-of-time appeal pursuant to his first state writ application, his conviction became final for limitations purposes at the conclusion of the out-of-time appeal process," in January 2004. J.A.89.

The courts below recognized that circuit precedent foreclosed this argument. J.A.90-92, 124-25. *Salinas* established that remedies derived from collateral review, like an out-of-time appeal, toll AEDPA's limitations period under § 2244(d)(2) but do not "restart" the period under § 2244(d)(1)(A). *Salinas*, 354 F.3d at 430. Thus, the district court dismissed Jimenez's petition, J.A.93, and denied his COA application, J.A.94-95. The Fifth Circuit agreed. J.A.124-25.

These decisions applied the settled principle that circuit precedent binds district courts and circuit panels. *E.g.*, *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 (5th Cir. 1992); *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). That is, although the COA standard asks whether the procedural ruling is "debatable among jurists of reason," *Slack*, 529 U.S. at 484, it is not "debatable" that district and circuit courts must follow circuit precedent in reviewing COA applications. *E.g.*, *Gordon v. Sec'y, Dept. of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007) ("If the petitioner's contention about the procedural ruling against him is foreclosed by a binding decision . . . the attempted appeal does not present a substantial question, because

reasonable jurists will follow controlling law."); *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005) ("[R]easonable jurists would not be able to debate whether this issue should have been resolved in a different manner by the district court [because]. . . . [c]ircuit precedent has specifically rejected the argument. . . .").

Because the district court correctly applied circuit precedent to dismiss Jimenez's claims, "a reasonable jurist could not conclude either that the district court erred in dismissing the petition," *Slack*, 529 U.S. at 484, or that a COA should issue.[28]

B. Jimenez Failed to State a Valid Claim of the Denial of a Constitutional Right.

Where, as here, a district court denies a habeas petition on procedural grounds without reaching the

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[28] Binding precedent does not foreclose a circuit court from reconsidering that precedent's resolution of issues posed in a COA application because the court can always revisit that precedent through en banc rehearing of a COA denial. *E.g.*, *Gonzalez v. Sec'y, Dept. of Corr.*, 366 F.3d 1253, 1260, 1262 (11th Cir. 2004) (en banc) (granting rehearing en banc to address two panels' COA denials); *Soffar v. Cockrell*, 300 F.3d 588, 590 & n.1 (5th Cir. 2002) (en banc) (after en banc review, reinstating panel's COA grants and denials); *see also Santiago Salgado v. Garcia*, 384 F.3d 769, 775 (9th Cir. 2004) (explaining that inmates denied COA may seek rehearing en banc); *Thomas v. United States*, 328 F.3d 305, 308 (7th Cir. 2003) (noting that "[o]ccasionally the denial of a request for a certificate of appealability will present the sort of legal question that justifies rehearing en banc").

inmate's underlying claim, a COA should issue only when the inmate *also* establishes "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Id.* at 484. Thus, a COA should not issue to resolve a procedural question when the inmate's constitutional claim lacks merit. *Id.*; *see also Khaimov v. Crist*, 297 F.3d 783, 786 (8th Cir. 2002) ("[E]ven if the procedural default is not clear, if there is no merit to the substantive constitutional claims, the certificate should not be issued."). Courts must analyze the claim's merit under AEDPA's heightened standards for granting habeas relief, *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)—*i.e.*, there must be "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2).

Jimenez's federal habeas petition alleged the deprivation of two constitutional rights at his 1995 revocation and sentencing hearing: (1) his due-process right to a neutral judge; and (2) effective assistance of counsel. Fed. Habeas Pet. at 7, 10-12, 16-21. Both claims were adjudicated in state court and properly denied. J.A.45-47, 66-74, 78. Neither assertion debatably states a valid constitutional claim.

1. Jimenez's judicial-bias allegations fail to state a valid constitutional claim.

Jimenez asserted that he was denied his due-process right to a neutral judge at his revocation and sentencing hearing. J.A.79. This claim presented the oddly paired contentions that (1) the judge had predetermined his 43-year sentence, and (2) the judge imposed this sentence because he became angry with Jimenez at the revocation hearing. *See* Fed. Habeas Pet. at 7, 10-12.

The Due Process Clause "requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (citation omitted). But inmates raising judicial-bias claims must "overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Moreover, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948).

Jimenez's bias claims are not credible because they are mutually contradictory. On one hand, Jimenez asserted that the judge was biased because, at the 1991 deferred-adjudication hearing, he "predetermined" that Jimenez would receive a 43-year sentence if he violated his probation. *See* Fed. Habeas Pet. at 7, 10-12. But Jimenez also alleged that the same judge was biased because he sentenced

Jimenez to 43 years after becoming angry with Jimenez during the revocation hearing. *See id.* Because Jimenez's petition recites two irreconcilably conflicting versions of the purported "facts" supporting his bias allegation, that allegation lacks credibility.

Jimenez's bias assertions also cannot independently withstand scrutiny. His "predetermination" assertion hinges solely on the judge's comment at the deferred-adjudication hearing that he had a habit of "mainly" using prime numbers in sentencing. *See id.*; *see also* 1.RR.11. This remark does not implicate the principle that punishing an offender at a predetermined level—without consideration of his individual circumstances—violates due process. *See United States v. Booker*, 543 U.S. 220, 237-39 (2005). The range of punishment for Jimenez's crime was 15-99 years. *See* TEX. PENAL CODE §§ 12.42(c)(1), 30.02. The judge's indication that he would likely use one of the 19 prime numbers within that range to determine a sentence was not a "predetermination" of Jimenez's ultimate sentence or a due-process violation.

Further, the record establishes that the judge did not "predetermine" Jimenez's sentence at the plea hearing. Indeed, the judge advised Jimenez that he did not know what punishment Jimenez would receive in the event of revocation because he was then unfamiliar with all of the facts of Jimenez's case. J.A.45-46. And at the revocation hearing, the judge recited the specific factors and evidence that

he considered in determining an appropriate punishment. J.A.46; 2.RR.116-17.

Jimenez's contention that the judge was biased because he purportedly grew angry with Jimenez during the revocation hearing is equally baseless in law and fact. The mere fact that a judge became annoyed or angry cannot support a bias claim. *Liteky v. United States*, 510 U.S. 540, 555-56 (1994). And nothing in the record indicates that the judge behaved improperly toward Jimenez. When he imposed the sentence, the judge understandably expressed disappointment with Jimenez's inability to meet his probation conditions and Jimenez's propensity for violence, *see* 2.RR.113-17, but these statements do not suggest judicial bias jeopardizing Jimenez's due-process rights.

2. Jimenez's ineffective-assistance allegations also fail to state a valid constitutional claim.

Jimenez alleged that he received ineffective assistance of counsel at his 1995 revocation hearing. *See* Fed. Habeas Pet. at 7, 16-21. To establish constitutionally deficient assistance of counsel, a habeas petitioner must demonstrate both "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. . . . [and] that counsel's errors were so serious as to deprive the defendant of

a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Jimenez's ineffective-assistance claim turns principally on his contention that counsel misled him into pleading "true" to two allegations of probation violations. *See* Fed. Habeas Pet. at 15-18. According to Jimenez, his attorney assured him that if he pled "true" to violating probation in not reporting to his probation officer and not paying his probation fees, a "conditional" plea bargain would take effect, so that even if his probation were revoked, his sentence would not exceed 15 years. Fed. Habeas Pet. at 16-18.

Even assuming that this alleged representation occurred, the State confirmed in open court that there was no plea agreement with Jimenez. 2.RR.16. He nonetheless pled "true" to two probation violations, 2.RR.16-18, even after the judge cautioned that his probation could be revoked based on a "true" plea to even one probation violation and that the sentencing range was 15-99 years. 2.RR.2-5, 15-16.

Indeed, Jimenez testified that his pleas (both true and false) were not based on any agreement, 2.RR.16-17, and that he was aware of all potential consequences of his pleas. 2.RR.2-5, 14-16. Thus, even if Jimenez misperceived that he had a plea agreement with the State, or that such an agreement circumscribed his potential prison term to 15 years, that misperception was extinguished at the revocation hearing.

Further, the court ruled against Jimenez on the two contested probation-violation allegations, holding that he violated probation by intentionally injuring Teresa Barron and by failing to timely report his arrest to his probation officer. 2.RR.10-15, 113. Thus, the court determined that all four of the State's allegations in its revocation motion were true. 2.RR.113. A "true" finding on even one of the allegations was sufficient to revoke Jimenez's probation. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [panel op.] 1980).

Because Jimenez's purported misperception of the effect of a "true" plea to violating two probation conditions could not possibly have prejudiced him at his revocation hearing, his federal petition failed to state a valid constitutional claim under *Strickland*.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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REPLY BRIEF

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CARLOS JIMENEZ,
Petitioner,

v.

NATHANIEL QUARTERMAN,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

Petitioner proved in the Texas courts that his appellate counsel provided him with constitutionally ineffective assistance of counsel. Applying a well-settled procedure under state law, the Texas courts reinstated his appeal. The reinstated proceedings constitute "direct review" of petitioner's criminal case in both name and substance. The Fifth Circuit nonetheless deemed the appeal to be part of the state's *collateral* review process – not "direct review" – and held on that basis that the federal habeas limitations period ran from the much earlier date on which petitioner's initial appeal was dismissed. Petitioner's opening brief demonstrated that the Fifth Circuit's decision is erroneous. Indeed, its construction of the federal habeas statute is so tortured and weak that neither any state nor the federal government has filed in support of it.

A simple hypothetical illustrates the illogic of the Fifth Circuit's rule. Suppose a defendant is denied his right to an initial appeal by his attorney's constitutionally ineffective assistance. Immediately after his appeal is dismissed, he properly raises that claim in a state post-conviction court, which agrees and reinstates the appeal, which takes eighteen months to conclude. Respondent implausibly contends that in this recurring scenario the "conclusion of direct review" nonetheless occurs upon the dismissal of the initial appeal deadline that results from constitutional error, not the termination of the reinstated appeal. But he provides no basis for thinking that Congress would have intended the limitations period to commence (and often expire)

well *before* the state courts even conclude their review of the conviction.

Because the respondent's brief fails to refute petitioner's showing that the ruling below errs in its construction of Section 2244, the judgment should be reversed.

I. ONLY PETITIONER'S CONSTRUCTION OF SECTION 2244(D)(1) RESPECTS THE STATUTE'S TEXT, STRUCTURE, AND PURPOSE.

1. The one-year limitations period for a state prisoner to file a federal habeas petition presumptively runs from "the date on which the judgment became final," which is defined as "the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Because petitioner's reinstated appeal constitutes "direct review," the statute of limitations ran from the date that proceeding became "final" and petitioner's federal habeas petition was timely filed.

a. Petitioner's reinstated appeal constituted "direct review" as that term is commonly understood and is defined by the Texas courts: the ordinary Texas rules of appellate practice and procedure apply; the defendant has a right to court-appointed counsel; the standard and scope of appellate review are the same as on the original appeal; the available relief is the vacatur or reversal of the judgment below; and state post-conviction review is unavailable until the proceedings are completed. *See generally* Pet. Br. Part I.C. *Cf. Mestas v. State*, 214 S.W.3d 1, 4 (Tex. Crim. App. 2007) (holding that when appeal is reinstated, defendant is not limited merely to

pursuing appeal but may also first file a motion for a new trial). *Contra* Resp. Br. 50-51 (placing no weight on the substance of appellate proceedings and relying on dictionary definition of "direct"); *id.* at 29 (asserting without any supporting authority that "an out-of-time appeal like Jimenez's is not considered timely").[1]

Although the Fifth Circuit recharacterized petitioner's reinstated appeal instead as part of the state post-conviction process, respondent does not dispute that the court of appeals was incorrect. If a defendant prevails before the Texas Court of Criminal Appeals on his claim that he received constitutionally ineffective assistance of appellate counsel, that court dismisses any further post-conviction proceedings and directs the defendant to proceed with his direct appeal. In order to pursue any other challenges to his conviction, the defendant must institute a new and separate post-conviction challenge *after* the conclusion of the reinstated direct appeal. *Ex parte Santana*, 227 S.W.3d 700, 704 (Tex. Crim. App. 2007); *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

b. Respondent himself notably acknowledges that – contrary to his principal submission – in many

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[1] As explained in petitioner's opening brief (at 22) and not contested by respondent, any other result would raise serious constitutional questions, as the State is obligated "to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of'" a violation of the Sixth Amendment right to counsel. *United States v. Virginia*, 518 U.S. 515, 547 (1996) (citation omitted).

cases, the conclusion of a reinstated appeal *will* trigger a new one-year time to seek federal habeas corpus. He agrees that is the rule whenever the state post-conviction court nominally "vacates" the trial court's judgment. In that circumstance, he contends, "the new judgment[] would have started a new clock for federal habeas" (Resp. Br. 36-37 n.15) because "the 'pertinent judgment' that was the subject of the collateral review no longer exists" (*id.* at 50; *see also id.* at 43). Courts that find ineffective assistance of appellate counsel thus regularly vacate the trial court's judgment in order to permit a new appeal to commence. *See, e.g.*, *Beasley v. State*, 883 P.2d 714, 720 (Idaho Ct. App. 1994); *People v. Antoniou*, 861 N.Y.S.2d 598, 599 (N.Y. App. Div. 2008) . In fact, the consistent practice of the federal courts of appeals in such cases is to vacate the defendant's sentence. *See, e.g.*, *United States v. Snitz*, 342 F.3d 1154, 1159 (10th Cir. 2003); *United States v. Phillips*, 225 F.3d 1198, 1201 (11th Cir. 2000); *United States v. Pearce*, 992 F.2d 1021, 1023 (9th Cir. 1993).

Respondent contends that a different rule applies when, as in this case, the trial court's judgment is not vacated. In that circumstance, he contends that the limitations period runs from the dismissal of the defendant's appeal, often several years earlier. But in many cases, whether the original judgment is vacated is nothing more than happenstance, rather than a considered determination. Thus, in *Rodriquez v. United States*, 395 U.S. 327, 332 (1969), this Court found ineffective assistance of appellate counsel and vacated the judgment by ordering that the defendant "be re-sentenced so that he may perfect an appeal."

By contrast, in *Evitts v. Lucey*, 469 U.S. 387, 390 (1985), this Court affirmed the district court order that the state "either reinstate[] [the defendant's] appeal or retr[y] him." The Texas practice is likewise varied depending on the circumstances, sometimes vacating the sentence, as in *Ex parte Axel*, 757 S.W.2d 369, 375 (Tex. Crim. App. 1988), *Ex parte Beck*, 621 S.W.2d 810, 811 (Tex. Crim. App. 1981), *Ex parte Rains*, 555 S.W.2d 478, 482 (Tex. Crim. App. 1977), and *Ex parte Campbell*, 494 S.W.2d 842, 844 (Tex. Crim. App. 1973), and sometimes, as in this case, reinstating the appeal without directly stating that the underlying conviction had been vacated. There is no support for respondent's view that Congress intended a different habeas limitations period to apply to the similarly situated defendants in these various cases.[2]

Respondent also apparently believes that the one-year limitations period would run from the conclusion of an appeal that is genuinely "reinstated," which he would define as an instance in which the state courts "reopen the old case, with the same cause number, at the point when the ineffective assistance of counsel occurred." Br. 39. But he never explains the logic behind such an entirely formalistic distinction between "reinstated" and "out-of-time appeals."

Respondent's construction of Section 2244 would thus produce an illogical patchwork in which the

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[2] *Rodriquez* and *Evitts* also illustrate that Congress enacted Section 2244 against the backdrop of decisions reinstating direct review as a remedy for ineffective assistance of appellate counsel. *See* Pet. Br. 36.

timeliness of a habeas petition varies depending on the form of judgment that the state post-conviction court happened to adopt from case to case and from state-to-state. Respondent's heavy reliance on "how courts describe" the relief they award (Br. 28; *see also id.* at 39-40 & n.19), directly contradicts his own sensible recognition that Congress did not intend the meaning of "direct review" to turn on "rules that vary from State to State concerning the appropriate remedy for an inmate's lost appeal rights due to ineffective assistance of counsel" (*id.* at 33 (citing *Clay v. United States*, 537 U.S. 522 (2003))). Congress could not logically have intended that the federal habeas deadline would depend on whether the state post-conviction court "reinstated" an appeal as respondent defines that term and whether it directly restarted the appellate deadline (as in this case) rather than formally vacating the defendant's sentence.[3]

c. Respondent also argues that direct review of petitioner's conviction became "final" when the court of appeals dismissed his initial appeal because "§ 2244(d)(1)(A)'s text does not contemplate multiple dates on which a state-court judgment becomes final." Br. 12. But respondent offers no support for that assertion. Nor is there any basis for his

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[3] Respondent notes in a footnote that a very small number of states permit courts to remedy claims of ineffective assistance of appellate counsel by deciding the merits of the defendant's appeal in post-conviction proceedings, rather than by instituting a new appeal. Br. 45 n.22. In the few cases arising under those procedures that give rise to federal habeas corpus petitions, the relevant question is whether the proceeding (though it occurs in the post-conviction court) has the hallmarks of direct review.

assumption that when a defendant's conviction becomes "final" because it is dismissed as a result of constitutionally ineffective assistance of counsel, no later event – such as a post-conviction court's order mandating further proceedings to remedy the constitutional violation – can commence a new period of direct review that becomes "final" upon its conclusion. As noted, even respondent concedes that petitioner's habeas petition would have been timely if the state post-conviction court had nominally vacated his sentence to restart the appellate timetable. *See supra* at 3. In any event, the court's order directing further proceedings is better understood as rendering the finality of the prior appeal a nullity, such that a single case does not in fact give rise to "two" final judgments. Instead, until the conclusion of the reinstated appeal ordered by the state post-conviction court, the conviction is "not yet final." *Samarron v. State*, 150 S.W.3d 701,706 n.6 (Tex. App. 2004).

In sum, because the reinstated appeal in this case constituted "direct review" for purposes of Section 2244, the one year limitations period ran from the "conclusion" of those proceedings, and petitioner's federal habeas petition was timely.

2. Beyond the statutory text, only petitioner's reading can be reconciled with the structure of Section 2244. Seemingly recognizing its indefensibility, respondent now abandons the heart of the court of appeals' ruling – *viz.*, that "AEDPA provides for only a linear limitations period, one that starts and ends on specific dates, with only the possibility that tolling will expand the period in between." *Salinas v. Dretke*, 354 F.3d 425, 429 (5th

Cir. 2004). In fact, Congress plainly contemplated that the limitations period would expire one year after the conclusion of direct review, yet be recommenced by, for example, this Court's recognition of retroactively applicable constitutional rights or the new discovery of the factual predicate of the defendant's claims. *See* Pet. Br. Part II.A (discussing Section 2244(d)(1)(C)-(D)).

Respondent shifts his argument to the assertion – notably made without citation to *any* supporting authority – that "the notion that 'collateral review' of a conviction could end before 'direct review' began is foreign to our jurisprudence" (Br. 43) and "contravenes [a] fundamental principle" of habeas law (*id.*). But respondent does not persuasively address the many counterexamples that disprove that claim. Take, for example, a case in which the state appellate court affirms the conviction and direct review concludes, but a post-conviction court (whether state or federal) finds constitutional error and orders further trial proceedings. *See* Pet. Br. 39 (citing *Penry v. Johnson*, 532 U.S. 782 (2001)); *see also Holmes v. South Carolina*, 547 U.S. 319, 322, 331 (2006) (after defendant's conviction, post-conviction court granted new trial; this Court reviewed and vacated latter judgment); *Richmond v. Lewis*, 506 U.S. 40, 43, 46 (1992) (reviewing habeas petition after final judgment based on state-court ordered resentencing); *Sawyer v. Whitley*, 505 U.S. 333, 337-38 (1992) (similar). In such cases, no one doubts that "direct review" encompasses an ensuing appeal, even when (as is common) the trial court's judgment is left intact (*e.g.*, *Nunez v. State*, 988 So.

2d 695, 697-98 (Fla. Dist. Ct. App. 2008); *Rawlins v. State*, 182 P.3d 1271, 1279 (Kan. Ct. App. 2008)).

Nor can respondent distinguish the related example of a case in which the defendant misses the deadline to file an appeal, but is nonetheless allowed to appeal on the basis of a finding of good cause. Pet. Br. 24 & n.7 (citing, *inter alia*, Fed. R. App. P. 4(a)(5)(A), (b)(4); Tex. R. App. P. 26.3, 68.2). Several states employ an indistinguishable procedure – an application to the state court of appeals or supreme court – for raising a claim that an appeal should be reinstated on the ground that the defendant received ineffective assistance of counsel. *See, e.g.*, ARK. R. APP. P. CRIM. 2(e); MICH. R. CT. 7.205(B); N.C. R. APP. P. 21(a)(1)-(2); *Ewing v. Commonwealth*, 734 S.W.2d 475, 476 (Ky. 1987); *State v. Molina*, 902 A.2d 200, 207 (N.J. 2006) (construing N.J. R. Ct. 2:4–4); *Montana v. Tweed*, 59 P.3d 1105, 1108-10 (Mont. 2005). An appeal reinstated on that ground is no less "timely" than one allowed *nunc pro tunc* for "good cause." The rules governing the appeals are moreover identical: both are reviewed under the same standard and subject to the same deadlines.[4]

Finally, respondent cannot distinguish these examples on the ground that they are part of "the

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[4] Though respondent attempts to distinguish such cases on the ground that courts nominally "*extend*" the deadline to appeal (Br. 27 (emphasis in original)), that does little to distinguish the Texas procedure under which the state courts expressly provide the defendant with a new time period for filing a notice of appeal. *See* Pet. 23; J.A. 27. Moreover, respondent elsewhere acknowledges that the substance of the proceeding, not the terminology, is controlling (*see supra* at 6).

usual direct-review process" and "an ordinary feature of state criminal appeals." Resp. Br. 25-26. As shown in petitioner's opening brief, reinstating direct appeals when necessary to remedy constitutionally deficient representation is also an ordinary feature of both state and federal procedure. Pet. Br. 25-27. There is little reason to think that Congress intended to defer to a state's decision to reopen an appeal that would otherwise be lost because counsel had good cause for missing an appeal deadline, yet intended to override the state's determination to reopen an appeal when an appeal was lost because counsel provided constitutionally deficient representation. A defendant in Texas faces a heavy burden in seeking to have his appeal reinstated (*see* Pet. Br. 53 (citing cases)), but the *process* employed by the state courts in considering such claims is rooted in a statute and governed by a well-established body of precedent. *See* Pet. Br. 52-53.

Respondent also maintains that Section 2244 presumes that defendants will exhaust their state remedies, then pursue federal habeas relief. But that is a strong argument in petitioner's favor. Obviously, if "direct review" concludes upon the erroneous dismissal of the defendant's initial appeal, then the defendant must proceed to federal court well before the conclusion of his reinstated state court appeal and subsequent state collateral proceedings. The hypothetical at the beginning of this Brief illustrates that point. Congress did not intend to deprive the state courts of "the opportunity to consider fully federal-law challenges to a state custodial judgment before the lower federal courts may entertain a

collateral attack upon that judgment." *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001). This Court should adhere to its determination not to read into Section 2244 the "serious statutory anomaly" that federal courts must "contend with habeas petitions that are in one sense unlawful (because the claims have not been exhausted) but in another sense *required* by law (because they would otherwise be barred by the one-year statute of limitations.)" *Carey v. Saffold*, 536 U.S. 214, 220 (2002).

Respondent finally relies on the assertion that, "because they are derived from postconviction or other collateral-review procedures[, reinstated appeals] cannot be accurately characterized as part of a State's 'direct review' process under § 2244(d)(1)(A)." Br. 42. But respondent's only citation in support of that critical assertion is "[s]*ee supra* Part II.A.2," which does not address the issue. If anything, the contrast between "direct" and "collateral" review actually supports petitioner. A reinstated appeal is not part of the state collateral process, and is not subject to any of the constraints applicable to post-conviction proceedings. *See supra* at 2-3. There is accordingly no reason to refuse to afford deference to the Texas courts' own determination that a reinstated appeal is part of its system of "direct review."

3. Petitioner's reading of the habeas statute is moreover most consistent with Congress's purpose in enacting Section 2244. The statute reflects a considered determination to grant state defendants one year from the final conclusion of all direct review proceedings to prepare state and federal habeas

corpus applications. According to respondent, by contrast, when the Texas courts resolved his direct appeal for the *first* time, petitioner had *no* time to seek federal habeas review of his criminal conviction.

The statutory text reflects Congress's determination to permit states to structure their systems of "direct review" in a fashion that accounts for the particular circumstances they confront. It is thus telling that respondent does not dispute the showing of *amici* Texas Fair Defense Project *et al.* that Texas's practice of reinstating appeals was a direct response to grave defects in the representation afforded to criminal defendants in that state. Respondent's reliance on other reforms adopted by the state to mitigate that crisis (Br. 21 n.8) only illustrates that the volume of reinstated appeals which give rise to subsequent federal habeas petitions will be limited in the future, such that it is not necessary to twist the meaning of "direct review" to accomplish that result.

Contrary to respondent's apparent assumption, the statute does not impose on defendants a generalized, free-floating obligation to proceed immediately to federal court. Congress instead sought to preserve the central role of the state courts in first reviewing state convictions. That review process may take many years, as defendants pursue appeals within the state system. *See* Pet. Br. 51. Moreover, state courts through their own collateral review proceedings may order further consideration of the case in the trial court, leading to further periods of direct review. The limitations period imposed by Section 2244 runs from the finality of

"direct review," not earlier. If state appeals take ten years to conclude, that fact has no bearing on whether a subsequent federal habeas application is timely.

It is moreover not disputed that state law protects against the prospect that defendants will unduly delay review of their state court convictions by bringing belated claims that they received ineffective assistance of appellate counsel. Not surprisingly, respondent points to no evidence of a material number of federal habeas petitions filed by defendants who delayed pursuing a claim that they received constitutionally ineffective assistance of appellate counsel.

Most states impose a strict time limit (most often one year) on such claims. *See, e.g.*, IDAHO CODE ANN. § 19-4902(a); KAN. STAT. ANN. § 60-1507(f); NEV. REV. STAT. ANN. § 34.726; TENN. CODE. ANN. § 40-30-102(a); WASH. R. APP. P. 16.4(d) (citing WASH. REV. CODE § 10.73.090). Those states that do not nonetheless account for the defendant's diligence, generally through the equitable principle of laches. *See* Pet. Br. 53 (citing cases); *see also, e.g.*, *Ex parte Florentino*, 206 S.W.3d 124, 126 (Tex. Crim. App. 2006) (Cochran, J., concurring) (laches did not bar application that state courts failed to process for several years).[5] The Texas courts have thus held that

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[5] Respondent's assertion in a footnote that in "many States," "collateral proceedings . . . are not subject to filing deadlines" (Br. 35 n.14) is thus somewhat misleading. The minority of states that impose no formal deadline often assess the timeliness of the application through the doctrine of laches or a requirement of diligence. *See, e.g.*, *Mead v. State*, 875 N.E.2d

a defendant's undue delay is a proper ground for denying a claim of ineffective assistance of appellate counsel because the application is untimely or because the defendant's tardiness undercuts the credibility of his claim that his constitutional rights have been violated. *See* Pet. Br. 53 (citing cases). But laches is a *defense* (*Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002); *New Jersey v. New York*, 523 U.S. 767, 806 (1998)), and the Texas courts appropriately hold that the state waives that defense by not raising it (*see Ex parte Steptoe*, 132 S.W.3d 434, 434 (Tex. Crim. App. 2004) (Price, J., concurring)), as occurred in this case. Although respondent now complains that petitioner demonstrated a "marked lack of diligence" in raising his constitutional claim of ineffective assistance of appellate counsel in the state system (Br. 10), he fails to acknowledge that he elected not to assert that argument in the appropriate forum – state court – which would have been in a position to develop an appropriate record and evaluate the reasons for the delay (*see Ex parte Steptoe*, 132 S.W.3d at 434-36 (Price, J., concurring)).[6]

304, 307 (Ind. App. Ct. 2007); *Paxton v. State*, 903 P.2d 325, 326-27 (Okla. Crim. App. 1995); *Ex parte Carrio*, 992 S.W.2d 486, 488 (Tex. Crim. App. 1999); *State* ex rel. *Coleman v. McCaughtry*, 714 N.W.2d 900, 908-10 (Wis. 2006).

[6] This case also does not present the question whether laches can be asserted as a defense to a federal habeas petition or whether a habeas petitioner is otherwise required to exercise due diligence in seeking state post-conviction review as a matter of federal law, because respondent has not raised either argument.

To be clear, a belated assertion of ineffective assistance of appellate counsel does not *ipso facto* restart the federal habeas limitations period, and for that reason petitioner's position does not undermine the one-year federal habeas deadline's salutary benefit of encouraging defendants to seek prompt review of their convictions. A defendant has every incentive to assert his state post-conviction claim in less than a year. As noted, the state courts police late filings through their own deadlines and the laches principle. In addition, merely *filing* a claim of ineffective assistance of appellate counsel does not affect the one-year limitations period; the defendant must actually *prevail* on that claim. Experience shows – and state defendants are well aware – that most defendants do not succeed in requests to reinstate their appeals. Thus, a defendant in Texas can secure a reinstated appeal only if he proves that he received constitutionally ineffective assistance of counsel. *See* Pet. Br. 53 (citing cases). It is only in the rare case in which a defendant *succeeds* on post-conviction review – as when the court orders further trial-related proceedings (*e.g.*, *Penry*, *supra*) or reinstates his appeal – that the conclusion of a new period of direct review will trigger the one-year habeas statute of limitations. In the substantial majority of cases – in which the defendant's appeal is not reinstated – the limitations period runs from the conclusion of the original, dismissed appeal.

II. Respondent Errs in His Reliance on the Statutory Tolling Provisions of Section 2244.

According to respondent, this case is properly resolved by reference to the tolling provisions of Section 2244, which he contends provide state defendants who have lost their rights to direct appeal with an adequate opportunity to seek federal habeas relief. Br. Part I.A.2. Those arguments, however, do not negate the proper construction of Section 2244(d)(1)(A), which controls the date on which the limitations period commences. Furthermore, respondent cannot reconcile his arguments that Section 2244(d) must be read as a strict limitations period (*see supra* Part I) with his exceptionally defendant-favoring construction of the statute's accompanying tolling provisions.

1. Under Section 2244(d)(2), the limitations period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending." Two years after the Fifth Circuit's decision in *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), announcing the rule applied in this case, this Court held in *Lawrence v. Florida* that a state post-conviction application is no longer pending once the post-conviction court of appeals "has issued its mandate or denied review" (549 U.S. 327, ___, 127 S. Ct. 1079, 1083 (2007)); *See* Pet. Br. 45. It is uncontested that the Texas Court of Criminal Appeals issues its judgment and mandate after deciding a defendant's post-conviction application to reinstate his appeal. J.A. 28-29 (mandate in this case). The application at that point

is no longer pending, and Section 2244(d)(2) is inapplicable. *See Frasch v. Peguese*, 414 F.3d 518, 522 (4th Cir. 2005) ("We reject the *Salinas* approach because it ignores that two separate proceedings are involved.").

Respondent notably fails to acknowledge *Lawrence*. Instead, he hopes to escape what he disparages as "a hyper-technical reading" of Section 2244(d)(2) (Br. 53) by echoing the Fifth Circuit's view that the period of a defendant's reinstated appeal does not count towards the one-year federal limitations period because it is "associated with . . . collateral review" (*id.* at 51). The relevant inquiry, however, is not whether state court "review" is still pending (*contra id.* at 49), but whether the "*application*" remains "pending." *Lawrence*, 549 U.S. at ___, 127 S. Ct. at 1081. Once the Texas Court of Criminal Appeals granted petitioner's post-conviction petition, that application was no longer pending. After the conclusion of the reinstated appeal, petitioner was required to institute a *new* state post-conviction application. *See supra* at 3. Contrary to Congress's intent, respondent's position thus requires defendants to seek federal habeas review well before the conclusion of a reinstated appeal and subsequent state post-conviction proceedings. *See supra* Part I.

2. Under Section 2244(d)(1)(D), the one-year habeas limitations period runs from "the date on which the factual predicate of the claim or claims presented [in the federal habeas petition] could have been discovered through the exercise of due diligence." Respondent's assertion that the statute tolls the starting date of the limitations period until

defendants learn that their appeals have been dismissed (Br. Part I.A.2) was not adopted by the Fifth Circuit, presumably because it ignores that this provision tolls the deadline only with respect to the discovery of the "claim[] presented" in the federal habeas petition, which is *not* the defendant's claim that he was improperly deprived of his right to an appeal. *That* claim is finally resolved by the state post-conviction court, and is not presented to the federal habeas court, at least when (as here) the defendant prevails on it in the state system. The cases relied upon by respondent – *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007), *DiCenzi v. Rose*, 452 F.3d 465 (6th Cir. 2006), and *Wims v. United States*, 225 F.3d 186 (2d Cir. 2000) – thus involve federal habeas claims by petitioners that they were denied effective assistance of counsel on appeal. The "factual predicate" of the distinct federal constitutional claims that petitioner set forth in his federal habeas petition in this case – for example, that he received constitutionally ineffective assistance of *trial* counsel (*see infra* at 28-29) – was not "discovered" when he learned that his direct appeal has been dismissed. *See* Resp. Br. 22 (seemingly recognizing that only Section 2244(d)(1)(B), not (D), would apply to "the claims raised in Jimenez's federal habeas petition").[7]

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[7] Respondent fails to acknowledge that he made precisely that point in the district court. *See* Resp. Answer with Brief in Support 9 ("Jimenez has not shown that he could not have discovered the factual predicate of his claims until a date subsequent to the date his conviction became final [under] 28 U.S.C. 2244(d)(1)(D). In fact, all the claims that Jimenez raises

3. Under Section 2244(d)(1)(B), the statute of limitations begins to run on "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." Advancing yet another argument not adopted by the Fifth Circuit, respondent contends that this provision tolls the limitations period if a defendant is not notified of the dismissal of his appeal. Br. 22. That argument is in substantial tension with his assertions that "an inmate is typically responsible for ensuring that courts have his correct address" (Resp. Br. 19) and that petitioner (who had no reason to suspect that his appeal had been dismissed) "did not act with appropriate diligence to keep advised of his appeal" (*id.* at 20 n.7). Respondent's position would thus, at a minimum, require a *post hoc* case-by-case assessment of the circumstances in which each habeas petitioner received notice of the dismissal of his appeal.

Furthermore, even assuming that the failure to notify a defendant that his appeal has been dismissed "prevent[s]" the filing of a federal habeas petition, the statute only applies to state action that violates the federal Constitution or a federal statute – a requirement respondent omits (*see* Resp. Br. 11, 19, 22) from his quotation of the statutory text. But courts consistently conclude that the "State's failure to notify an inmate of the disposition of a petition for

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in this action were either available to him when he pled guilty in 1991 and was adjudicated guilt and sentenced on November 6, 1995 . . . .").

discretionary review or a habeas application filed pursuant to state law" does not violate the United States Constitution or federal law. *Hicks v. Quarterman*, No. H-06-2208, 2007 U.S. Dist. LEXIS 1478, at *9-*10 (S.D. Tex. Jan. 8, 2007).[8]

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[8] *See also Leggitt v. Palakovich*, No. 05-5845 2006 U.S. Dist. LEXIS 44807, at *12 n.6 (E.D. Pa. Apr. 17, 2006) (citing *Maraj v. Gillis*, No. 04-1544 2005 U.S. Dist. LEXIS 86, at *1-*2 (E.D. Pa. Jan. 4, 2005) ("[A] state court clerk's alleged failure to timely mail an opinion does not constitute a state-action impediment sufficient to trigger § 2244(d)(1)(B)."), *aff'd*, No. 05-5845 2006 U.S. Dist. LEXIS 44813 (E.D. Pa. June 21, 2006); *Jarrett v. Renico*, No. 00-10255-BC 2006 U.S. Dist. LEXIS 790, at *6 (E.D. Mich. Jan. 3, 2006) (noting that Section 2244(d)(1)(B) was not applicable because "[state] trial court's inadvertent failure to inform petitioner that it had denied his habeas corpus complaint did not violate federal law"); *Douglas v. Dretke*, No. H-05-0851 2005 U.S. Dist. LEXIS 43216, at *14 (S.D. Tex. Oct. 26, 2005) (citing *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986)) (finding no action in violation of Constitution or law when court mailed copy of decision denying state habeas petition to prison facility where petitioner was previously housed, and prison officials failed to forward copy); *Grimes v. McDonough*, No. 1:04cv432/MMP/EMT 2006 U.S. Dist. LEXIS 73408, at *17 (N.D. Fla. July 17, 2006) (stating that court's failure to notify petitioner that his submission was not a proper motion for post-conviction relief "not the type of state impediment envisioned in section 2244(d)(1)(B)"), *aff'd*, No. 1:04-cv-00432-MP-EMT 2006 U.S. Dist. LEXIS 73402 (N.D. Fla. Sept. 22, 2006); *Miles v. Dretke*, No. 4:05-CV-0491-Y 2005 U.S. Dist. LEXIS 27353, at *4-*6 (N.D. Tex. Nov. 10, 2005) (noting Section 2244(d)(1)(B) not applicable when court mailed copy of denial of state habeas application to former prison address), *aff'd*, No. 4:05-CV-491-Y 2005 U.S. Dist. LEXIS 31542 (N.D. Tex. Dec. 6, 2005).

These decisions are consistent with cases arising outside of the habeas context. *See, e.g., Pilcher v. McGraw*, No. 7:07-cv-00279, 2007 U.S. Dist. LEXIS 40877, at *4 (W.D. Va. June 5, 2007) (finding that for purposes of Section 1983, negligence in

Nor is Section 2244(d)(1)(B) relevant on the theory that petitioner's appellate counsel unconstitutionally prevented him from seeking federal habeas corpus review. The lower courts recognize that "ineffective assistance of counsel cannot constitute a state-created impediment under § 2244(d)(1)(B)." *Irons v. Estep*, No. 05-1412, 2006 U.S. App. LEXIS 9792, at *4-*5 (10th Cir. Apr. 17, 2006) (quoting *Polk County v. Dodson*, 454 U.S. 312, 325 (1981)); *Finch v. Miller*, 491 F.3d 424, 427 (8th Cir. 2007) (same); *Crawford v. Jordan*, No. 04-CV-346-TCK-PJC, 2006 U.S. Dist. LEXIS 78204, at *12 (N.D. Okla. Oct. 24, 2006) (same); *Dunker v. Bissonnette*, 154 F. Supp. 2d 95, 106 (D. Mass. 2001) (same). That conclusion follows from this Court's holding that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County*, 454 U.S. at 325. "The limited case law applying § 2244(d)(1)(B) has dealt almost entirely with the conduct of state prison officials who interfere with inmates' ability to

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failing to timely mail copy of court order does not violate Constitution even if delay prevented timely appeal), *aff'd*, 252 Fed. Appx. 541 (4th Cir. 2007). Courts have also concluded that Section 2244(d)(1)(B) does not apply to other similar clerical mistakes and negligent actions. *See, e.g.*, *Holloway v. Jackson*, No. 05-10253 2007 U.S. Dist. LEXIS 56695, at *10 (E.D. Mich. July 19, 2007) (losing petitioners' "entire court file" mere "negligent act" that "does not rise to the level of a constitutional violation"); *Jernigan v. Franklin*, No. 02-CV-469-TCK-SAJ 2006 U.S. Dist. LEXIS 62289, at *15 (N.D. Okla. Aug. 30, 2006) (loss of petitioner's pauper's affidavit not "unconstitutional State action"), certificate of appealability denied at 214 Fed. Appx. 816 (10th Cir. 2007).

prepare and to file habeas petitions by denying access to legal materials" *Shannon v. Newland*, 410 F.3d 1083, 1087 (9th Cir. 2005)), and "[ineffective assistance of counsel] is not the type of State impediment envisioned in § 2244(d)(1)(B)" *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005), *aff'd on other grounds*, 549 U.S. 327, 127 S. Ct. 1079 (2007); *see also Outler v. United States*, 485 F.3d 1273, 1280 (11th Cir. 2007) (stating that State's appointment of an "incompetent attorney" was "not the type of impediment contemplated by" Section 2244(d)(1)(B))).

III. RESPONDENT'S PROPOSED ALTERNATIVE GROUND FOR AFFIRMANCE LACKS MERIT.

The district court dismissed petitioner's habeas petition as time-barred without addressing the merits of his constitutional claims. J.A. 75-93. It then denied petitioner's application for a Certificate of Appealability (COA) without addressing whether reasonable jurists would debate the validity of petitioner's constitutional claims. J.A. 94-95. The Fifth Circuit likewise denied petitioner's application for a COA – without undertaking the substantive inquiry into the merits of petitioner's claims under *Slack v. McDaniel*, 529 U.S. 473 (2000) – holding only that reasonable jurists would not debate whether "the § 2254 petition is time-barred." J.A. 126. Respondent nonetheless contends that petitioner was not entitled to a COA because reasonable jurists would not find the merits of his habeas claims debatable. Br. 54. That argument has been waived, does not warrant this Court's attention, and provides

no basis for affirming the Fifth Circuit's judgment in any event.

1. Respondent's contention that petitioner cannot satisfy the COA inquiry comes too late in this Court, and should instead be resolved by the lower courts on remand. Respondent did not raise the argument below, as he elected not to respond to petitioner's COA application in the Fifth Circuit. *See* J.A. 6-9 (Fifth Circuit docket); *cf.* 5TH CIR. R. 22 (rules governing responses to COA). Nor did respondent raise this argument as an alternative ground for affirmance in his brief in opposition to certiorari. Respondent has accordingly waived the issue by raising it for the first time in its merits brief in this Court.[9]

Respondent attempts to elide his failure to preserve his alternative ground for affirmance by shoehorning the issue into the question presented, which he broadly characterizes as being "whether [petitioner] was entitled to a certificate of appealability." Resp. Br. 54. But that contention, even if correct, does not excuse respondent's failure to raise the argument in his brief in opposition. In any event, the *pro se* petition's reference to a COA simply reflects the procedural posture of the case. The substantive issue presented was, in the case of a reinstated appeal, "should the 1-year limitations

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[9] *See, e.g.*, *Lee v. Kemna*, 534 U.S. 362, 376 n.8 (2002) (State waived argument by failing to "advance its current contention in [its] Eighth Circuit brief or in its brief in opposition to the petition for certiorari"); *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (deeming *Teague* argument waived by State for failing to raise it below or in opposition to petition for writ of certiorari).

[period] begin to run after [the petitioner] has completed that direct review." Pet. i. Any ambiguity is resolved by the body of the petition, which is directed at the circuit conflict over that question. Put another way, this Court presumably would not have granted certiorari to decide the fact-bound question whether petitioner's substantive constitutional claims were debatable by jurists of reason (*cf. Jimenez v. Quarterman*, 128 S.Ct. 1646 (2008) (limiting grant of certiorari to Question One presented by the petition and declining to decide petitioner's claim of entitlement to tolling of limitations period)) and that issue is not "fairly included" within the question presented (*see, e.g.*, *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Energy*, 127 S. Ct. 1199, 1207 (2007) (rejecting arguments not "'fairly included' within the question presented in [the] petition for certiorari," because "we granted certiorari to re resolve a conflict among lower courts . . . , which is analytically distinct from, and fundamentally at odds with [respondent's] reading of [the statute]")).

This Court should also decline respondent's invitation to invest its resources in deciding the merits of petitioner's underlying constitutional claims in the first instance, an issue that does not merit its attention. In contrast to the circuit conflict over whether the time to seek federal habeas review begins to run from the conclusion of reinstated proceedings, the question whether petitioner can show that reasonable jurists would debate the validity of his constitutional claims is governed by settled law, and respondent has identified no circuit

split implicated by the issue. Furthermore, the question is so narrow and limited to the specific circumstances of petitioner's case that the Court's answer will have little relevance beyond a few factually similar cases. *Cf. Fry v. Pliler*, 127 S. Ct. 2321, 2327-28 (2007) (noting that the Court granted certiorari to resolve a circuit split on the choice between two standards and reading the question presented narrowly so as not to reach "tangential and factbound questions"). Even if the Court were to conclude that respondent has not waived his argument regarding the substantive *Slack* inquiry, it should remand the case to permit the lower courts to address it in the first instance. *Cf. Anza v. Ideal Steel Supply Co.*, 547 U.S. 451, 462 (2006).

Remand is also the course charted by *Slack* – this Court's only previous application of § 2253(c) after a district court erroneously dismissed a habeas petition on procedural grounds. In *Slack*, the Court concluded that jurists of reason could disagree with the district court's procedural ruling but declined to decide whether reasonable jurists could debate the validity of the habeas petition's underlying constitutional claim. Because the substantive issue was neither "briefed nor presented below," the Court remanded the case for the lower courts to make that determination in the first instance. *Slack*, 529 U.S. at 485. Here, too, there has been no opportunity to fully brief or present the substantive issues in the lower courts, and no court has considered the substantive *Slack* inquiry. As a result, the Court is "without the benefit of the [lower courts'] analysis" of whether the validity of petitioner's constitutional

claims is debatable. *Anza*, 547 U.S. at 462.

2. In any event, respondent is wrong in asserting that petitioner would not be entitled to a COA. Preliminarily, respondent errs in arguing that, because Fifth Circuit precedent controlled the § 2241(d)(1)(A) issue and bound district courts and circuit court panels, the question was by definition not debatable. In *Slack* itself, the lower courts denied a certificate of probable cause ("CPC"), the pre-AEDPA version of the COA, on the basis of established circuit precedent, but this Court reversed, concluding that the issue was debatable under the COA standard. 529 U.S. at 479-80, 489. This Court was even more explicit in *Lozada v. Deeds*, 498 U.S. 430 (1991) (per curiam), in which it reversed the denial of a CPC in one circuit because other circuits had resolved the issue differently. *Id.* at 432; *see Lambright v. Stewart*, 220 F.3d 1022, 1025-26 (9th Cir. 2000) (reading *Lozada* to hold that "even though a question may be well-settled in a particular circuit, the petitioner meets the modest CPC standard where another circuit has reached a conflicting view").[10] Under *Lozada*, even though *Salinas* settled the § 2241(d)(1)(A) issue in the Fifth Circuit, it remained debatable for purposes of the COA standard because the Fourth and Tenth Circuits had reached the contrary conclusions. *See Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005); *Orange v. Calbone*, 318 F.3d 1167 (10th Cir. 2003).

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[10] There is no relevant distinction between CPCs and COAs, as this Court has recognized that the § 2253(c) standard for issuance of a COA is simply a codification of the judge-made standard for issuance of a CPC. *Slack*, 529 U.S. at 483.

Petitioner has moreover satisfied the *Slack* standard, which is a "preliminary" inquiry (*Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003)) that does not require "full consideration of the factual or legal bases adduced in support of the claims" (*id.* at 336). To meet this requirement, petitioner need only show that the validity of his constitutional claims is debatable among reasonable jurists or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Petitioner need not demonstrate that "the appeal will succeed." *Miller-El*, 537 U.S. at 337. Nor must petitioner show that "some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Petitioner has made the requisite showing under *Slack* and *Miller-El*. For example, petitioner alleges that his trial judge exhibited a high degree of antagonism towards him at his probation revocation hearing. J.A. 105 (citing Pet. Resp. to Director Dretke's Ans. with brief in support at 13A-20 (citing, in turn, Fed. Hab. Pet. 7)); *see also* Fed Hab. Pet. 10-12. Petitioner outlines instances where the judge became irate, ridiculed his cognitive abilities, and intimated that petitioner's children would be better off without him. These comments suggest that the judge based petitioner's sentence on his own personal animosity and anger rather than an individual consideration of petitioner's circumstances. Fed.

Hab. Pet. 7, 10-12 (citing 2 RR 6-9, 74-75, 115). As a result, petitioner raises at least a debatable constitutional claim of judicial bias. *See Rowsey v. Lee*, 327 F.3d 335, 341 (4th Cir. 2003) (granting COA where judge made statements expressing personal animosity towards the petitioner); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) (noting that a judge's critical, disapproving, or hostile remarks violate due process if they show "a high degree of favoritism or antagonism as to make fair judgment impossible").

Petitioner has likewise raised a debatable claim of ineffective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (extending *Strickland* to plea process). Petitioner alleges that his counsel failed to properly advise him of the factual basis, nature, consequences, and (possibly) even the existence of a plea agreement that his counsel supposedly had made with the State regarding his sentence. *See* J.A. 106 (referencing Pet. Resp. to Director Dretke's Ans. with brief in support at 27-31); *see also* Fed. Hab. Pet. 16-18. Had petitioner properly understood the consequences of the agreement, he would not have pled true to any of the allegations in the State's Motion to Revoke (2 RR 14, ln. 14-25; 15 ln. 1-2), and the court may not have made the same findings. Although probation may be revoked on the basis of a single true plea, jurists of reason could debate whether each additional true plea (including those admitted by petitioner) ultimately increased the sentence imposed. These allegations show at least a debatable denial of the

well-settled right of a defendant considering a plea to be advised correctly by counsel of the available options and possible consequences. *See Brady v. United States*, 397 U.S. 742, 756 (1970); *United States v. Mooney*, 497 F.3d 397, 401-04 (4th Cir. 2007); *Dando v. Yukins*, 461 F.3d 791, 798-800 (6th Cir. 2006); *Lewandowski v. Makel*, 949 F.2d 884, 888-89 (6th Cir. 1991); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981).

CONCLUSION

For the reasons above, as well as those stated in the brief for the petitioner, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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No. 07-6984

In The

Supreme Court of the United States

CARLOS JIMENEZ,
Petitioner,
v.
NATHANIEL QUARTERMAN,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* TEXAS FAIR DEFENSE PROJECT AND TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a court finds that a defendant lost his right of direct appeal because of a violation of his Sixth Amendment right to the effective assistance of counsel, and accordingly reinstates his appeal, does the time to seek federal habeas review run from the conclusion of the reinstated proceedings?

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Ex parte Malpica,
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Ex parte Owens,
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Ex parte Parker,
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Ex parte Perry,
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Ex parte Raley,
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Texas Rules of Appellate Procedure
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Texas Rules of Appellate Procedure
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OTHER AUTHORITIES AND MATERIALS

Appalling Appointment System Must Be Overhauled, DALLAS MORNING NEWS, December 8, 2000, at 30A, *available at* 2000 WLNR 9484129 ..... 4, 6

Terry Brooks and Shubhangi Deoras, *Texas Enacts Landmark Reforms*, 16 CRIMINAL JUSTICE 56 (Fall 2001) 10

Allan K. Butcher and Michael K. Moore, MUTING GIDEON'S TRUMPET (September 22, 2000), *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm ..... *passim*

Mark Donald, *Wheel of Justice*, DALLAS OBSERVER, October 18, 2001, *available at* http://www.dallasobserver.com/2001-10-18/news/wheel-of-justice/ 4

Final Approval of Revisions to the Texas Rules of Appellate Procedure, Misc. Docket No. 06-105 (Tex. Crim. App. August 20, 2007), *available at* http://www.cca.courts.state.tx.us/rules/trap-final_order-06-105.pdf 16

TABLE OF AUTHORITIES – Continued

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Scott Henson, *Hervey on Innocence Proposals: "We're past meet and discuss,"* GRITS FOR BREAKFAST, June 4, 2008, *available at* http://gritsforbreakfast.blogspot.com/2008/06/hervey-on-innocence-proposals-were-past.html 26

Indigent Defense, FORT WORTH STAR-TELEGRAM, October 15, 2000, at 2, *available at* 2000 WLNR 1279061 9

Doris J. James & Lauren E. Glaze, U.S. DEP'T. OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf 27

Laura M. Maruschak, U.S. DEP'T. OF JUSTICE, MEDICAL PROBLEMS OF JAIL INMATES 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mpji.pdf 27

Viveca Novak, *The Cost of Poor Advice*, TIME, July 5, 1999, at 38, *available at* 1999 WLNR 6291551 6

Bob Sablatura, *Study Confirms Money Counts in County's Courts*, HOUSTON CHRONICLE, October 17, 1999, at 1A, *available at* http://www.chron.com/CDA/archives/archive.mpl?id=1999_3171764 .....7, 9

State Bar Of Texas, STANDARDS FOR THE PROVISION OF LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, 64 Tex. B.J. 682, 686 (2001), *available at* http://www.uta.edu/pols/moore/indigent/standards.htm 15

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TEXAS APPLESEED, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE IN TEXAS (2000), *available at* http://www.courts.state.tx.us/tfid/Resources.asp 8, 9, 10, 11

Texas Department of Criminal Justice, FISCAL YEAR 2006 STATISTICAL REPORT 1 (2006), *available at* http://www.tdcj.state.tx.us/publications/executive/FY_2006_Statistical_Report.pdf 26

Texas Fails To Give Fair Defense To Poor, SAN ANTONIO EXPRESS-NEWS, December 17, 2000, at 2G, *available at* 2000 WLNR 9673774 .....4, 6

BRIEF FOR *AMICI CURIAE* TEXAS FAIR DEFENSE PROJECT AND TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*[1]

The Texas Fair Defense Project is a nonprofit organization based in Austin, Texas. TFDP works to improve the fairness and accuracy of the criminal justice system in Texas, with a primary focus on improving access to counsel and the quality of representation provided to poor people accused of crime. TFDP routinely monitors state and local practices for delivering legal services to indigent criminal defendants, and works to protect the right to the effective assistance of counsel in all Texas courts.

With over 2,600 members, the Texas Criminal Defense Lawyers Association is the nation's largest state association of criminal defense attorneys. Founded almost 40 years ago, TCDLA provides assistance, support and continuing education to its members. TCDLA seeks to protect the rights guaranteed

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. Both petitioner and respondent have consented to the filing of *amici* briefs in support of either party, and have filed the letters of consent with the Clerk of the Court.

by the Texas and Federal Constitutions in criminal cases, and to promote the just adjudication of those cases. TCDLA members represent criminal defendants on a daily basis in courthouses across Texas – at trial, on direct appeal, and in state and federal habeas proceedings.

Amici therefore have deep and broad knowledge of their state's criminal justice system. The Texas procedures at issue in this case were developed decades ago, in response to systemic problems in Texas's indigent defense system that deprive some defendants of the effective assistance of counsel after a judgment of conviction is entered but before it becomes final. Texas's highest criminal court, the Texas Court of Criminal Appeals, may grant a remedy colloquially known as an "out-of-time" appeal to defendants who otherwise would lose, due to counsel error, their ability to pursue any claims on direct appeal. The Fifth Circuit's rule undermines the CCA's remedy for this fundamental constitutional error by curtailing or eliminating the ability of affected defendants to obtain federal habeas review of any additional constitutional challenges to their convictions.

STATUTES INVOLVED

The text of 28 U.S.C. § 2244(d) appears at pages 1-2 of the Brief for the Petitioner. The text of Article

11.07 of the Texas Code of Criminal Procedure appears in the Appendix to this *amici* brief, and is cited hereafter as "Article 11.07 § ___."

SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals granted Carlos Jimenez an out-of-time appeal because his State-appointed counsel's ineffective assistance effectively deprived Mr. Jimenez of his direct appeal. In doing so, the CCA did not consider the underlying merits of the appeal; it simply reinstated the direct appeal for hearing and determination on the merits. At times, such relief is necessary because Texas historically has failed to provide some defendants with effective assistance of counsel on appeal – this may occur when a defendant's trial counsel abandons the client after the trial court enters a judgment of conviction, new appellate counsel is not appointed in a timely fashion, deadlines are missed, the record is not perfected and briefs are not filed, or the client is not informed of her or his rights on appeal.

At the time Mr. Jimenez's appointed lawyer failed to protect his client's rights, there was no indigent defense "system" in Texas – the State provided no funds for indigent defense, and there were no statewide policies for providing indigent defendants with counsel, or minimum qualifications for

counsel seeking court appointments. Instead, there was a "crazy quilt – a mess of different procedures."[2] A study of the State Bar of Texas found a "crisis" in indigent defense,[3] and newspapers across the state urged reform of an "appalling"[4] and "grossly unfair"[5] system. The failure of Mr. Jimenez's counsel to inform him of his rights on appeal is part of this larger pattern of indigent defense shortfalls in Texas. Although the Texas legislature attempted to remedy some of these systemic deficiencies through adoption of the Fair Defense Act in 2001, access to effective counsel from the time of conviction through direct appeal remains a problem. *See, e.g., Ex parte Owens*, 206 S.W.3d 670, 678 (Tex. Crim. App. 2006) (Womack and Cochran, JJ., concurring in the grant of an out-of-time appeal).

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[2] Mark Donald, *Wheel of Justice*, DALLAS OBSERVER, October 18, 2001, *available at* http://www.dallasobserver.com/2001-10-18/news/wheel-of-justice/. All internet sites noted in this brief were visited June 18, 2008.

Internal quotations and citations in materials quoted in this brief have been omitted and, unless otherwise stated, any emphasis has been added.

[3] *See, e.g.*, ALLAN K. BUTCHER AND MICHAEL K. MOORE, MUTING GIDEON'S TRUMPET 21, 22 (September 22, 2000), *available at* http://www.uta.edu/pols/moore/indigent/whitepaper.htm.

[4] Editorial, *Appalling Appointment System Must Be Overhauled*, DALLAS MORNING NEWS, December 8, 2000, at 30A, *available at* 2000 WLNR 9484129.

[5] Editorial, *Texas Fails To Give Fair Defense To Poor*, SAN ANTONIO EXPRESS-NEWS, December 17, 2000, at 2G, *available at* 2000 WLNR 9673774.

Because these problems sometimes manifest themselves during the direct appeal process, the Texas CCA created the system of reinstating direct appeals through grants of out-of-time appeals. While the ultimate decision to grant or deny rests with the CCA, that court makes its decision only after the convicting court first investigates the pertinent facts, resolves any conflicts in the evidence, considers any defenses raised by the State, makes appropriate findings of fact, and provides both the evidentiary record and a recommended disposition to the CCA. *See* Article 11.07, §§ 3, 5.

The CCA's grant of an out-of-time appeal reinstates the direct appeal, so that the defendant "may then, with the aid of [effective] counsel," secure "a *meaningful* appeal from his conviction." *Ex parte Raley*, 528 S.W.2d 257, 259 (Tex. Crim. App. 1975). Examination of the circumstances, procedures, and function of out-of-time appeals demonstrates both that the Texas High Court regards this remedy as part of the process of direct review, and that the Fifth Circuit's ruling will compound systemic problems in Texas's indigent defense system by limiting the federal habeas rights of defendants who have been denied an entire stage of their state criminal proceedings due to the ineffective assistance of counsel.

ARGUMENT

I. TEXAS'S STRUGGLING INDIGENT DEFENSE SYSTEM LEAVES SOME DEFENDANTS UNREPRESENTED AFTER JUDGMENT

A. When Mr. Jimenez Lost His Right of Appeal, the Texas Indigent Defense System Was a "National Embarrassment"

In 2000, a State Bar of Texas report called Texas's indigent defense system "a national embarrassment" that needed "serious reform" because it ignored "at least the spirit of *Gideon v. Wainwright*." MUTING GIDEON'S TRUMPET, at 8, 22. Texas's "appalling"[6] indigent defense system was "grossly unfair to poor defendants"[7] and "at the bottom of the heap" among her sister states.[8] Practitioners, researchers, and even judges consistently documented a failure to create minimum qualifications for, and require training of, attorneys accepting court appointments; flawed procedures that delayed appointment of counsel or allocated appointments based on attorneys' willingness to "move cases" or contribute to judicial reelection campaigns rather than on attorneys' competency; and inadequate funding at both the state

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[6] Editorial, *Appalling Appointment System Must Be Overhauled*, *supra*, at 30A.

[7] Editorial, *Texas Fails To Give Fair Defense To Poor*, *supra*, at 2G.

[8] Viveca Novak, *The Cost of Poor Advice*, TIME, July 5, 1999, at 38, *available at* 1999 WLNR 6291551.

and county level. As a result, poor people accused of crime were more likely to go to jail than defendants who could afford to hire counsel.[9]

Two studies released in 2000 detailed the shortcomings of indigent defense in Texas. The first, MUTING GIDEON'S TRUMPET, was a statewide survey of indigent defense practices commissioned by the State Bar of Texas's Committee on Legal Services to the Poor in Criminal Matters. The second, THE FAIR DEFENSE REPORT, written in conjunction with national indigent defense experts at The Spangenberg Group, surveyed a representative sample of Texas counties. TEXAS APPLESEED, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE IN TEXAS (2000).[10]

"With few exceptions," researchers found that "training for defense counsel who handle indigent defense cases [was] inadequate," FAIR DEFENSE REPORT at 38, and that appointments were often seen as a way for inexperienced attorneys to "hang out a shingle" and "cut their teeth." *Id.* at 24; *see also* MUTING GIDEON'S TRUMPET at 6. In most counties, there were no minimum eligibility criteria for attorneys accepting court-appointed cases or requirements

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[9] Bob Sablatura, *Study Confirms Money Counts in County's Courts*, HOUSTON CHRONICLE, October 17, 1999, at 1A, *available at* http://www.chron.com/CDA/archives/archive.mpl?id=1999_3171764; *see also* MUTING GIDEON'S TRUMPET, *supra*, at 19-20.

[10] *Available at* http://www.courts.state.tx.us/tfid/Resources.asp.

for continuing legal education programs in criminal law and procedure. FAIR DEFENSE REPORT at 49.

Authors of these studies found that delay in appointing counsel was a "pervasive and serious problem." FAIR DEFENSE REPORT at 45. The State Bar was told "the story of a woman who sat in jail for 27 days before an attorney was assigned to her matter. Within 45 minutes of receiving the case, her court-appointed attorney determined the case lacked merit, he approached the prosecutor who agreed, and the judge ordered her released." MUTING GIDEON'S TRUMPET at 11.

The studies also revealed that judges routinely made appointment decisions improperly. MUTING GIDEON'S TRUMPET at 11-13; FAIR DEFENSE REPORT at 21-22. ALMOST half of all judges surveyed reported that their colleagues on the bench "sometimes appoint counsel because they have a reputation for moving cases, *regardless of the quality of the defense they provide* . . . " MUTING GIDEON'S TRUMPET at 12 (emphasis in original); *see also* FAIR DEFENSE REPORT at 21-22. Judges "sometimes consider[ed] whether an attorney contributed to their campaign or was a political supporter when making appointments," and it was "not uncommon for judges to solicit campaign contributions from criminal defense attorneys and then imply that the attorneys [would] recoup their contributions in the form of appointed work." MUTING GIDEON'S TRUMPET at 13; *see also* FAIR DEFENSE REPORT at 21.

Texas spent less on indigent defense than nearly every other state. FAIR DEFENSE REPORT at 47. The State itself provided no funds for indigent defense, leaving the burden completely upon county governments. *Id.* at 48. "[N]one of the 23 counties [examined in the FAIR DEFENSE REPORT] provide[d] sufficient funds to assure quality representation to all indigent defendants." *Id.* at 47.

Inadequate training, funding, and problematic appointment procedures meant that "[c]riminal defendants with court-appointed attorneys tend[ed] to get sentenced to time behind bars more often than defendants who [could] afford to hire their own lawyers. And the poor typically receive[d] longer punishment."[11] A study in Harris County (Houston) found that in 1996, "58 percent of the defendants with appointed counsel were sentenced to jail or prison, compared with 29 percent of defendants represented by private attorneys."[12]

In sum, researchers found that "the current system of indigent legal representation ignores at

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[11] Editorial, *Indigent Defense*, FORT WORTH STAR-TELEGRAM, October 15, 2000, at 2, *available at* 2000 WLNR 1279061.

[12] Sablatura, *supra*, at 1A (cited in KELLIE DWORACZYK, THE BEST DEFENSE: REPRESENTING INDIGENT CRIMINAL DEFENDANTS, HOUSE RESEARCH ORGANIZATION, FOCUS REP. No. 76-18, 10 (1999), *available at* http://www.hro.house.state.tx.us/focus/indigent.pdf); *see also* MUTING GIDEON'S TRUMPET at 19-20 (finding that three out of four defense attorneys surveyed responded that retained counsel "usually" or "always" provided better representation than appointed counsel).

least the spirit of *Gideon v. Wainwright*," that "[i]n Texas, indigent criminal representation is, at times, politicized [and] ineffective," that "defense attorneys are frequently provided with neither proper financial incentives nor with sufficient resources to vigorously defend their clients," and "most disturbingly, the current system appears to provide a lower standard of justice for the state's poor." MUTING GIDEON'S TRUMPET at 22.

Spurred by the findings of MUTING GIDEON'S TRUMPET and the FAIR DEFENSE REPORT, in 2001 the Texas legislature passed the Fair Defense Act (FDA), 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 906.[11] The FDA was an "historic" change in the way Texas delivers indigent defense services. *Id.* at 56. The FDA gave counties responsibility for creating standardized indigent defense systems, required adoption and publication of minimum standards for attorneys seeking criminal appointments, and mandated the adoption of transparent systems for allocating appointments. *Id.* Importantly, for the first time, the state provided a small amount of money for indigent defense. FDA, 77th Leg., R.S., ch. 906 § 10.

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[11] *See, e.g.*, Terry Brooks & Shubhangi Deoras, *Texas Enacts Landmark Reforms*, 16 CRIMINAL JUSTICE 56 (Fall 2001), *available at* http://www.equaljusticecenter.org/new_page_3.htm. The "Fair Defense Act" is the popular name for all of the 2001 revisions to state statutes governing indigent defense.

B. Systemic Problems Persist in Texas's Indigent Defense System, Depriving Indigent Defendants of Their Rights on Appeal

Given the widespread problems in trial courts documented in MUTING GIDEON'S TRUMPET and the FAIR DEFENSE REPORT, the FDA focused on trial-level reforms, leaving the appellate system relatively untouched – yet the problems with appointed counsel are just as serious after conviction as prior to conviction.

For example, the trial court in *Ex parte Goodall*, 632 S.W.2d 750, 751 (Tex. Crim. App. 1982), found that appointed counsel had failed to fulfill numerous obligations on direct appeal, and that, accordingly, "the conduct of applicant's counsel was ineffective, denying applicant any meaningful appeal."[14] *Id.* at 751. The CCA agreed, saying:

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[14] The trial court's findings in *Goodall* were: "(1) Notice of appeal was timely given. (2) Notice that the record was complete was given applicant's appointed counsel on appeal. (3) Notice that the record had been approved was given that same counsel. (4) Applicant's counsel did not timely request the preparation of the transcript of the record. (5) The statement of facts was not timely filed. (6) Applicant's counsel has never filed a brief and all time limits for such filing or requests for extension to file have expired. (7) Applicant's counsel has never filed for an extension of time to file the transcription of the record or an appellant's brief. (8) That the conduct of applicant's counsel was ineffective, denying applicant any meaningful appeal." *Id.* at 751.

> Based on these findings, the trial court has recommended applicant's writ be granted permitting an out-of-time appeal only. We agree. Appointed counsel's lack of effective representation on appeal of applicant is *appalling* and can *only* be remedied by placing applicant in the same position after he gave notice of appeal as he would have been had an attorney never been appointed to represent applicant in his direct appeal of his conviction.

Id.

Additional examples of the circumstances in which out-of-time appeals have been granted include the failure to appoint appellate counsel in a timely manner, resulting in missed deadlines on appeal, *e.g.*, *Jones v. State*, 98 S.W.3d 700, 702 (Tex. Crim. App. 2003); *Ex parte Rosales*, No. AP-75,728, 2007 WL 2403343 (Tex. Crim. App. Aug. 22, 2007) (unpublished);[15] failure of trial counsel to withdraw and seek timely appointment of appellate counsel, *e.g.*, *Ex parte Lopez*, 763 S.W.2d 427, 429 (Tex. Crim. App. 1989); *Ex parte Holguin*, No. AP-75,180, 2006 WL 120277 (Tex. Crim. App. Jan. 18, 2006) (unpublished); errors in addressing notice to the defendant of his rights on appeal, *e.g.*, *Ex parte Parker*, Nos. AP-75,517

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[15] Although unpublished decisions of the CCA may not be cited as "authority" in Texas courts, *amici* presents them here only as additional illustrations of the factual circumstances in which the CCA has granted relief.

and 75-117, 2006 WL 2751237 (Tex. Crim. App. Sept. 27, 2006) (unpublished); and other errors of appointed counsel in failing to provide timely or accurate information to their clients, *e.g.*, *Ex parte Axel*, 757 S.W.2d 369, 371 (Tex. Crim. App. 1988); *Ex parte Malpica*, No. AP-75,801, 2007 Tex. Crim. App. Unpub. LEXIS 645 (Tex. Crim. App. 2007) (Tex. Crim. App. Dec. 5, 2007) (unpublished).[18]

Indeed, things derailed so badly in one recent case that the CCA had to grant the remedy *twice*, because counsel appointed after the first grant was as ineffective as his predecessor. *See Ex parte Franks*, No. AP-75,814, 2008 WL 151078 (Tex. Crim. App. Jan. 16, 2008) (unpublished). In *Franks v. State*, 219 S.W.3d 494, 498 (Tex. App. – Austin 2007), the CCA had previously granted a first out-of-time appeal, but the intermediate appellate court ended up dismissing that appeal when new counsel failed to file a timely notice of the reinstated appeal. The CCA then granted a second out-of-time appeal in *Ex parte Franks*, No. AP-75,814.

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[18] *See also Ex parte Perry*, No. AP-75,337 (Tex. Crim. App. Feb. 8, 2006) (unpublished) http://www.cca.courts.state.tx.usopinions/HTML/OpinionInfo.asp?OpinionID=13580 (holding that applicant entitled to out-of-time appeal because counsel filed late notice of appeal); *Ex parte Odneal*, No. AP-75,336 (Tex. Crim. App. February 8, 2006) (unpublished) http://www.cca.courts.state.tx.usopinions/HTML/OpinionInfo.asp?OpinionID=13581 (holding that applicant was entitled to file out-of-time petition for discretionary review because counsel did not timely inform applicant that his conviction had been affirmed or that he could file a petition for discretionary review from his conviction).

This systemic problem has drawn the attention of the Texas legislature as well as the CCA, and both have attempted to remedy defendants' loss of appellate rights because of counsel's failure to apprise them of these rights. Until recently the legislature and CCA have met with limited success.

The Texas legislature first attempted to address the problem of counsel's failure to represent defendants after judgment of conviction with a 1987 amendment to the Code of Criminal Procedure that explicitly gave counsel a duty to represent their clients after judgment and through appeal. Act of June 19, 1987, 70th Leg., R.S., ch. 979 § 2, 1987 Tex. Gen. Laws 979 (amending TEX. CODE OF CRIM. PROC. 26.04(a)). The CCA attempted to impose the same solution. In *Ex parte Axel*, 757 S.W.2d 369 (Tex. Crim. App. 1988), the CCA delineated appointed counsel's responsibility to inform defendants about their appellate rights after judgment. *Id.* at 374; *see also Ex parte Wilson*, 956 S.W.2d 25, 26 (Tex. Crim. App. 1997) ("[a] defendant given an appeal of right is entitled to counsel who must inform the defendant . . . of the right to appeal, including expressing professional judgment as to possible grounds for appeal and their merit, and delineating advantages and disadvantages of appeal."); *Ward v. State*, 740 S.W.2d 794, 796 (Tex. Crim. App. 1987) (emphasizing that "an appointed attorney's legal responsibilities do not magically and automatically terminate at the conclusion of trial.").

The 1987 amendments to the Code of Criminal Procedure, *Axel*, and *Wilson* all suffered from the same fundamental flaw: complete reliance on frequently unreliable, underpaid, and untrained attorneys. *See, e.g., Ex parte Owens*, 206 S.W.3d 670, 678 (Tex. Crim. App. 2006) (Womack and Cochran, JJ., concurring) (criticizing *Axel* and *Wilson* for depending solely on attorneys to admonish defendants of their rights on appeal in confidential, off-the-record meetings).[11] Recognizing that this procedure is flawed, the CCA has adopted the practice of allowing defendants to file out-of-time appeals when counsel fails in his or her duties.

C. New Reforms May Improve Protection of Defendants' Appellate Rights and Reduce the Need for Out-of-Time Appeals

As noted above, one of the failings of the Texas indigent system has been that defendants have been actually or constructively denied the right to counsel on appeal. *See* Section I.B., *supra*. Trial counsel sometimes abandoned defendants after judgment, leaving them unrepresented as appellate timelines

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[11] *See also* STATE BAR OF TEXAS, STANDARDS FOR THE PROVISION OF LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, 64 Tex. B.J. 682, 686 (2001), *available at* http://www.uta.edu/pols/moore/indigent/standards.htm. Standard 3.4 sets forth the timeframe of representation for appointed counsel and the accompanying commentary notes the widespread problem of late appointment of counsel for appeal. *Id.*

ran. *Id.* Appellate counsel, if appointed, sometimes failed to inform defendants about their rights on appeal. *Id.* Although numerous previous attempts to address this issue have failed, recent amendments to the Texas Code of Criminal Procedure take new steps to ensure that defendants will be informed of their appellate rights, and thus the CCA likely will grant fewer out-of-time appeals in the future.

In 2007, the CCA amended the Texas Rules of Appellate Procedure to help eliminate this form of ineffective assistance of counsel on appeal.[18] Effective September 1, 2007, the trial court is required to inform the defendant of "his rights concerning an appeal, as well as any right to file a *pro se* petition for discretionary review. This notification shall be signed by the defendant, with a copy given to him." TEX. R. APP. P. 25.2(d). *Compare Ex Parte Axel*, 757 S.W.2d at 374 (holding that only counsel, not the court, has the duty to explain rights of appeal to defendant). Moreover, whenever a defendant has a right to appeal, "the court (orally or in writing) shall advise the defendant of his right to appeal and of the requirements for timely filing a sufficient notice of appeal." TEX. R. APP. P. 25.2(h). Finally, the CCA amended the rules to require that defense counsel inform defendants of their right to file a *pro se* petition for discretionary

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[18] *Final Approval of Revisions to the Texas Rules of Appellate Procedure*, Misc. Docket No. 06-105 (Tex. Crim. App. August 20, 2007), *available at* http://www.cca.courts.state.tx.us/rules/trap-final_order-06-105.pdf.

review by certified mail after their conviction is affirmed, with a copy to the court of appeals. TEX. R. APP. P. 48.4.

In sum, while Texas has been making some progress in expunging the stigma of a "national embarrassment," out-of-time appeals will remain an important remedy so long as systemic deficiencies in the State's indigent defense system persist.

II. OUT-OF-TIME APPEALS ARE AN IMPORTANT COMPONENT OF DIRECT REVIEW OF CRIMINAL CONVICTIONS IN TEXAS

A. The Texas Scheme of Direct Review

Every Texas defendant enjoys the right of appeal from the judgment of conviction, TEX. CODE CRIM. PROC. Art. 44.02, and the Sixth Amendment secures to indigent defendants the right to "effective assistance of counsel" on appeal through the appointment of a State-provided attorney. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). Appeals of non-capital cases are heard by one of the fourteen regional intermediate courts of appeal, TEX. CODE CRIM. PROC. Art. 4.03, and the Texas Rules of Appellate Procedure specify the customary procedures and deadlines for filing the notice of appeal, preparation and perfection of the record, and briefing, argument and disposition on the merits. *See, e.g.*, TEX. R. APP. P. 25.2(b); 26.2(a)(1). If the judgment is affirmed, the defendant may then petition the CCA for discretionary review. *See* TEX. R.

APP. P. 68.1. Although a non-capital defendant has no right to counsel on a petition for discretionary review ("PDR"), appellate counsel must inform a defendant of his right to file a *pro se* PDR. *Id.* 25.2(d), (e), (h)."

B. Out-of-Time Appeals Restore the Direct Appeal as a Remedy for the State's Failure to Provide Effective Assistance of Counsel

The State's efforts to provide effective assistance by appointed counsel leave much to be desired, and this problem has persisted for years. *See* Part I *supra*. Not surprisingly, therefore, the CCA developed the out-of-time appeal process in an effort to remedy the situation. Although the process for seeking an out-of-time appeal is nominally called a "habeas" proceeding under Article 11.07, that process does not challenge the underlying judgment of guilt in any conventional, "habeas" sense. Instead, through the process a defendant simply may be awarded reinstatement of the direct appeal, thereby "placing applicant *in the same position* after he gave notice of appeal *as he would have been* had an attorney never been appointed to represent applicant in his direct appeal of his conviction." *Ex parte Goodall*, 632 S.W.2d at 751. The CCA's

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" As in most jurisdictions that impose capital punishment, capital defendants in Texas enjoy the right of appeal directly to the CCA. *See, e.g., Henderson v. State*, 962 S.W.2d 544 (Tex. Crim. App. 1997), *cert. denied*, 525 U.S. 1078 (1988).

Opinion in Mr. Jimenez's case likewise ordered that he be

> [R]eturned to that point in time at which he may give written notice of appeal so that he may then, with the aid of counsel, obtain a meaningful appeal. For purposes of the Texas Rules of Appellate Procedure, all time limits shall be calculated as if the sentence had been imposed on the date that the mandate of this Court issues. (J. App. at 27).

The out-of-time appeal thereby functions much like warranty repairs or a Lemon Law in the automotive field, for upon a showing of Sixth Amendment defects in workmanship by appointed counsel, appropriate remediation is ordered. This reinstatement of the direct appeal is functionally identical to the state procedures considered in *Orange v. Calbone*, 318 F.3d 1167, 1170-71 (10th Cir. 1167), and *Frasch v. Peguese*, 414 F.3d 518, 524 (4th Cir. 2005), and to the counterpart remedies of many other jurisdictions.[20] As *Frasch* explained, the defendant

> was denied, through no fault of his own, his right to an appeal which he desired and to which he was entitled. Such a defendant is granted a belated appeal to ensure that he obtains as full a review as if his appeal had been properly pursued. (414 F.3d at 524).

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[20] *See* Brief for the Petitioner at 24-27, collecting the authorities.

The CCA views things the same way: "Granting an out-of-time appeal *restores* the pendency of the direct appeal." *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997); *Ex parte Santana*, 227 S.W.2d 700, 704 (Tex. Crim. App. 2007) (quoting *Torres*). Therefore, the CCA does not view an application an application for an out-of-time appeal as a collateral attack upon the judgment, and it is *not* a "first" habeas application under Article 11.07 § 4's strictures regarding "second" habeas applications. *Id.*; *see also* Brief for the Petitioner at 27-32.

It is therefore abundantly clear that the Texas CCA regards out-of-time appeals as a component of the Texas scheme of direct review of criminal convictions. Indeed, words of greater clarity than those quoted in this section of the brief would be difficult to imagine.

C. Procedures for Obtaining an Out-of-Time Appeal in Texas

1. Initial Screening and Fact Finding by the Trial Court

Long before 28 U.S.C. § 2244(d) was enacted in 1996, and continuously since, the CCA has used Article 11.07's procedures – especially those of Section 3 of the Article – to screen applications and determine whether an out-of-time appeal is merited. This makes sense. The particular circumstances of an application may require factfinding, resolution of conflicting evidence, consideration of the State's defenses, and

perhaps other matters pertinent to the applicant's entitlement to relief. Section 3 of Article 11.07 conveniently provides measures well-adapted to these tasks.

Section 3(c) assigns to "the convicting [trial] court" initial responsibility to determine whether disputed fact issues exist. If not, the convicting court returns the application and the State's answer to the CCA for final determination. *Id.* However, if the trial court finds that the factual predicate of the application is "controverted," Section 3(d) requires the trial court to resolve the controversy, if necessary based on evidence presented by "affidavits, depositions, interrogatories" or at an evidentiary "hearing," as well as by "using personal [judicial] recollection" if appropriate. *Id.*, § 3(d). The trial court essentially serves the role of "special master" to the CCA, and files with the CCA its findings of fact and recommended disposition, and the evidentiary record upon which they rest.

The importance of the CCA's use of trial court for factfinding is particularly evident in applications that may not involve such record-obvious omissions as appointed counsel's failure to file a notice of appeal or a brief, but instead raise issues of counsel's obligations to keep clients fully informed. While the criminal appeal system in Texas is broadly similar to other jurisdictions, until 2007, Texas depended entirely on defense counsel to advise defendants of their rights to appeal – unlike almost every other jurisdiction.

Owens, 206 S.W.3d at 675-6 (Womack, J. concurring).[21] In contrast, the Federal Rules of Criminal Procedure require that the trial court admonish a defendant of his or her right to appeal after conviction or sentencing. *See* FED. R. CRIM. P. 32(j)(1).

Because of the exclusive reliance on counsel to admonish defendants, when counsel, through action or inaction, fails to fulfill the duty to inform a defendant of his rights, the defendant is entitled to relief through an out-of-time appeal. *See Owens*, 206 S.W.3d at 676 (granting out-of-time PDR because of counsel's failure to inform defendant he had a right to file a *pro se* petition for discretionary review). Cases of this kind often require the district court to find the facts on conflicting evidence or evidence outside the original record, such as he-said she-said conflicts between the recollections of defendant and appointed counsel or, as in the present case, whether notice was in fact mailed to and received by Mr. Jimenez. *See* Brief for the Petitioner at 5-6.

2. Ultimate Determination by the Texas CCA

After the trial court submits its findings, the evidentiary record and its recommended disposition,

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[21] In September 2007, the Texas Rules of Appellate Procedure were changed to require the courts to ensure that defendants receive proper admonitions of their rights. TEX. R. APP. P. 25.2, 48.4; *see also* Part I.C. *supra*.

the CCA determines whether the applicant is entitled to relief. *See* Section 5 of Article 11.07. Although findings of fact are customarily reviewed deferentially,[22] the decision to grant or deny an out-of-time appeal is that of the CCA alone and relief is far from automatic. The defendant must show by a preponderance of the evidence that his attorney was constitutionally deficient. For example, in *Ex parte Scott*, 190 S.W.3d 672, 673 (Tex. Crim. App. 2006) the CCA rejected the trial court's recommendation to grant, and denied relief because

> the record does not support the trial court's conclusion that Applicant has proven, by a preponderance of the evidence, that his appellate attorney provided constitutionally ineffective assistance of counsel on appeal which prevented Applicant from filing a petition for discretionary review.

Applicants must also "make a limited showing of prejudice," namely, "a reasonable probability that, absent counsel's errors, a particular proceeding would have occurred." *Ex parte Santana*, 227 S.W.3d 700, 704 (Tex. Crim. App. 2007) (denying relief). Where counsel error "result[ed] in the deprivation of an entire judicial proceeding, such as an appeal," the

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[22] *See Ex parte Mowbray*, 943 S.W.2d 461, 465 (Tex. Crim. App. 1996) (holding that in Article 11.07 hearings, "the judge determines the credibility of the witnesses" and if the judge's "findings of fact are supported by the record, they should be accepted . . . ").

applicant has made the necessary showing. *Ex parte Crow*, 180 S.W.3d 135, 138 (Tex. Crim. App. 2005).

As well, the State may raise defenses like laches or unwarranted delay in seeking relief when a defendant seeks an out-of-time appeal. In *Ex parte Galvan*, 770 S.W.2d 822, 824 (Tex. Crim. App. 1989), for example, the CCA refused to reinstate the direct appeal, saying

> This Court has consistently and properly held that we have no desire to impose upon defendants the requirement that claims for relief be asserted within a specified period of time. Such a rule would be arbitrary and probably unconstitutional. Nevertheless, a petitioner's delay in seeking relief can prejudice the credibility of his claim. As noted, it is obvious that the applicant knew of his right to appeal. Further, he never claims that he actually advised anyone he wanted to appeal. Applicant's trial attorney states that he was never asked to appeal the case. Thus, compliance with the first prerequisite to obtain an out of time appeal because of the ineffective assistance of counsel on appeal: a defendant must manifest a desire to appeal, was not proven by the applicant.[13]

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[13] To succeed on a formal defense of laches, the State must "(1) make a particularized showing of prejudice, (2) show that the prejudice was caused by the petitioner having filed a late petition, and (3) show that the petitioner has not acted with reasonable diligence as a matter of law." *Ex parte Carrio*, 992

(Continued on following page)

D. Lack of Access to Resources and Repeated Transfers May Result in Delays Before Prisoners Are Able to File Motions for Out-of-Time Appeals

Although unwarranted delay by the applicant for an out-of-time appeal is a ground on which to deny relief, many delays result in circumstances for which the State alone bears responsibility. Some delay is inevitable when defendants seek an out-of-time appeal: the defendant has lost the benefit of State-provided counsel, and needs time to learn his rights and how to exercise them. In addition, defendants face routine bureaucratic and procedural obstacles that delay their filing of an Article 11.07 application for an out-of-time appeal.

Texas prisoners may move frequently among facilities. After judgment, defendants go from county jails to state prison intake facilities. The average stay at intake facilities is just 45 days, so a defendant may move twice before his appeal is filed, meaning that even diligent counsel may lose track of his or her client, or mail may be greatly delayed. In addition, prisoners have limited access to legal materials at these transfer facilities. *See, e.g.*, *Egerton v. Cockrell*,

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S.W.2d 486, 488 (Tex. Crim. App. 1999) (emphasis in original), citing *Walters v. Scott*, 21 F.3d 683, 686-87 (5th Cir. 1994). Although *Carrio* was not an "out-of time" appeal proceeding, there is no reason to suppose that the CCA would reject its holding in an appropriate case seeking reinstatement of the direct appeal.

334 F.3d 433, 439 (5th Cir. 2003) (noting that legal materials at the first two facilities where the prisoner was held were inadequate).

An indigent defendant who lost his right to direct appeal then would have to navigate habeas *pro se* to reinstate the right. There is no right to counsel in Article 11.07 proceedings, but as Judge Barbara Hervey of the CCA recently noted, even with extensive legal training and experience, judges and lawyers frequently make errors in Article 11.07 proceedings. Judge Hervey noted that "Judges need to better understand how to handle writs," and that, of the 6,000-8,000 non-capital post-conviction writs the CCA processes per year, about *half* are remanded for "further consideration" because of mistakes, frequently mistakes made by inadequately-trained judges and lawyers rather than *pro se* applicants.[34]

Defendants applying for 11.07 relief *pro se* often face the complexity of 11.07 applications with significant intellectual handicaps. On average, Texas prisoners have about an eighth grade education.[35] Many prisoners also suffer mental impairments and require

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[34] Scott Henson, *Hervey on Innocence Proposals: "We're past meet and discuss,"* GRITS FOR BREAKFAST, June 4, 2008, *available at* http://gritsforbreakfast.blogspot.com/2008/06/hervey-on-innocence-proposals-were-past.html.

[35] TEX. DEP'T OF CRIMINAL JUSTICE, FISCAL YEAR 2006 STATISTICAL REPORT 1 (2006), *available at* http://www.tdcj.state.tx.us/publications/executive/FY_2006_Statistical_Report.pdf.

drug or alcohol treatment upon arrival in prison.[28] This Court, in *Halbert v. Michigan*, 545 U.S. 605 (2005), noted the "perilous" nature of "[n]avigating the appellate process without a lawyer's assistance" for those "who have little education, learning disabilities, and mental impairments." *Id.* at 621.

Accordingly, delays in seeking out-of-time appeals usually result from circumstances beyond the control of the applicant, and the State "does not come with very good grace" complaining about matters for which it alone is responsible. *See J. Truitt Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981).

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In sum, systemic deficiencies in the Texas system of indigent representation deprive some defendants of "more than a fair judicial proceeding"; instead, the "deficiency has deprived respondent of the appellate

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[28] *See, e.g.*, LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, MEDICAL PROBLEMS OF JAIL INMATES 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mpji.pdf; DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf. Nationwide in 2006, 22 percent of jail inmates reported a learning impairment such as dyslexia or attention deficit disorder, and 8 percent reported a mental health condition severe enough to prevent them from participating fully in school, work, or other activities. MARUSCHAK, *supra*, at 1; 56 percent of prison and jail inmates without mental problems met the criteria for substance dependence or abuse and 74 percent of prisoners with mental problems met these criteria, JAMES & GLAZE, *supra*, at 1.

proceeding altogether." *Roe v. Flores-Garcia*, 528 U.S. at 483. Out-of-time appeals remedy these deprivations, and such appeals are therefore an important part of the system of direct review of criminal convictions in Texas. For these reasons, 28 U.S.C. § 2244(d) should not be read to exacerbate the situation faced by indigent defendants initially deprived of their Sixth Amendment rights on their direct appeals.

CONCLUSION

The judgment of the court of appeals in this cause should be reversed.

Respectfully submitted,

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APPENDIX
TEXAS CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

Procedure After Conviction Without Death Penalty

Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Sec. 2. After indictment found in any felony case, other than a case in which the death penalty is imposed, and before conviction, the writ must be made returnable in the county where the offense has been committed.

Sec. 3.

(a) After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall make appropriate notation thereof, assign to the case a file number (ancillary to that of the conviction

being challenged), and forward a copy of the application by certified mail, return receipt requested, or by personal service to the attorney representing the state in that court, who shall answer the application not later than the 15th day after the date the copy of the application is received. Matters alleged in the application not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus. If the convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answers filed, and a certificate reciting the date upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing,

and hearings, as well as using personal recollection. The state shall pay the cost of additional forensic testing ordered under this subsection, except that the applicant shall pay the cost of the testing if the applicant retains counsel for purposes of filing an application under this article. The convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact.

(e) For the purposes of Subsection (d), "additional forensic testing" does not include forensic DNA testing as provided for in Chapter 64.

Sec. 4.

(a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based

on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

(b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Sec. 5. The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though

originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Sec. 6. Upon any hearing by a district judge by virtue of this Act, the attorney for applicant, and the state, shall be given at least seven full days' notice before such hearing is held.

Sec. 7. When the attorney for the state files an answer, motion, or other pleading relating to an application for a writ of habeas corpus or the court issues an order relating to an application for a writ of habeas corpus, the clerk of the court shall mail or deliver to the applicant a copy of the answer, motion, pleading, or order.